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WILCOX & CO

No. 9442

United States Circuit Court of Appeals

For the Ninth Circuit.

BARNARD-CURTISS COMPANY, a corporation,
Appellant,

vs.

ERNEST MAEHL,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 546 SANSOME STREET, SAN FRANCISCO

No. 9442

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

Mr. J. J. McDONALD
of Philipsburg, Montana, and

Messrs. POPE, SMITH AND SMITH,
of Missoula, Montana,
Attorneys for Plaintiff and Appellee.

Mr. HOWARD TOOLE
of Missoula, Montana, and

Mr. W. T. BOONE
of Missoula, Montana,
Attorneys for Defendant and Appellant.

[1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana

No. 1714

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY, a corporation,

Defendant.

Be it remembered that on May 6, 1938, Complaint was filed in the above-entitled court, being in the words and figures following, to wit: [2]

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY, a corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant and alleges:

First.

For a first cause of action against the defendant herein plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That on or about the 22nd day of July, 1936, at Philipsburg, in the County of Granite, Montana, the Plaintiff and the defendant entered into a certain agreement wherein and whereby the plaintiff agreed to perform certain work, [3] labor and timber clearing for the defendant, and to clear of brush and timber a certain tract of land consisting of 118 acres, upon which said tract of land the defendant was engaged in, or about to commence the construction of a certain dam and reservoir for the storage of certain waters of the East Fork of Rock Creek, in the County of Granite, State of Montana, and the defendant promised and agreed to pay the plaintiff One Hundred ($100.00) Dollars per acre therefor.

3.

That pursuant to said agreement and on or about the 24th day of August, 1936, the plaintiff com-

menced the said work, labor and clearing of the said tract of land and completed the said work, labor and clearing of the said tract of land, consisting of 118 acres of clearing, as aforesaid, on the 17th day of January, 1937.

4.

That plaintiff performed each and all of the terms and conditions of said agreement and the defendant promised and agreed to pay the plaintiff therefor One Hundred Dollars for each and all of the 118 acres of land so cleared, as aforesaid, amounting to the sum of $11,800.00, and that said work, labor and clearing was reasonably worth said sum, but the defendant has not paid the same nor any part thereof except the sum of Eight Thousand Three Hundred Sixty and 30/100 ($8,360.30) Dollars, and there now remains due and unpaid on said agreement from said defendant to plaintff herein the sum of Three Thousand Four Hundred Thirty-nine and 70/100 ($3,439.70) Dollars, together with interest thereon at the rate of six per cent. per annum since the 17th day of January, [4] 1937, no part of which has been paid to the plaintiff herein.

Second

For a second cause of action against the defendant herein plaintiff complains and alleges:

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized

under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That on or about the 1st day of September, 1936, at the city of Philipsburg, Granite County, Montana, the plaintiff and the defendant entered into a certain agreement wherein and whereby the plaintiff agreed to perform certain work, labor and grubbing, and to grub out, clear away and remove all stumps, roots and other debris from the surface of a certain gravel bar and tract of land consisting of twenty acres for use by defendant as and for a gravel pit. That said tract of land or gravel pit is on the East Fork of Rock Creek, in the County of Granite, Montana, and in the immediate vicinity of and at the place where defendant was then engaged in, or about to commence the construction of a certain dam and reservoir for the storage of certain waters of said East Fork of Rock Creek, in said Granite County, Montana, which said gravel pit was prepared for the use of the defendant in [5] the construction of said dam and reservoir, and the defendant promised and agreed to pay the plaintiff Sixty-five ($65.00) Dollars per acre for

said work, labor and grubbing in preparing said gravel pit.

3.

That pursuant to said agreement and on or about the 1st day of September, 1936, the plaintiff commenced the said work, labor and grubbing in preparing said gravel pit and completed the same and finished with the removal of all stumps, roots and other debris on said twenty acre tract of land and gravel pit, and completed the preparation of said gravel pit on or about the 1st day of October, 1936.

4.

That plaintiff performed each and all of the terms and conditions of said agreement and the defendant promised and agreed to pay the plaintiff therefor Sixty-five ($65.00) Dollars for each and all of the said twenty acres of land so grubbed and cleared of stumps, roots and other debris, as aforesaid, amounting to the sum of Thirteen Hundred ($1300.00) Dollars, and that said work, labor, grubbing, clearing of stumps, roots and other debris in preparing said gravel pit was reasonably worth said sum, and the defendant has not paid the same nor any part thereof, and there now remains due and unpaid on said agreement and from said defendant to the plaintiff herein the sum of Thirteen Hundred ($1300.00) Dollars, together with interest thereon at the rate of six per cent. per annum since the 1st day of October, 1936, no part of which has been paid.

Third

For a third cause of action against the defendant [6] herein the plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, State of Montana.

2.

That between the 24th day of August, 1936, and the 17th day of January, 1937, at the dam and reservoir on the East Fork of Rock Creek, in the County of Granite, State of Montana, plaintiff performed certain work, labor and services for the defendant, at the special instance and request of defendant, in cutting, preparing for use and saving for the defendant herein approximately six thousand stulls.

3.

That said work, labor and services so rendered by the plaintiff for the defendant in cutting, preparing for use and saving for the defendant the said stulls was and is reasonably worth Four Hundred Twenty-four ($424.00) Dollars.

4.

That the defendant has not paid the same nor any part thereof, and there now remains due and unpaid to the plaintiff from the defendant on account of said stulls the sum of Four Hundred Twenty-four ($424.00) Dollars, together with interest thereon at the rate of six per cent. per annum [7] since the 17th day of January, 1937, no part of which has been paid.

Fourth

For a fourth cause of action against the defendant herein the plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office.

2.

That between the 29th day of June, 1936, and the 21st day of August, 1936, at the County of Granite, Montana, the plaintiff performed certain services for the defendant, at the special instance and request of defendant, and that said services

consisted of and in hauling and transporting certain workmen and employees of defendant to and from the city of Philipsburg, and the West Fork Road Camp of defendant, on the West Fork of Rock Creek, all in the County of Granite, Montana.

3.

That the said services so rendered by the plaintiff for the defendant herein was and is reasonably worth One Hundred Five and 60/100 ($105.60) Dollars.

4.

That the defendant has not paid the same nor [8] any part thereof, and there now remains due and unpaid to the plaintiff from the defendant on account of said services the sum of One Hundred Five and 60/100 ($105.60) Dollars, together with interest thereon at the rate of six per cent. per annum since the 21st day of August, 1936, no part of which has been paid.

Fifth

For a fifth cause of action against the defendant herein plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State

of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That between the 13th day of September, 1936, and the 2nd day of October, 1936, inclusive, at the County of Granite, Montana, the plaintiff performed certain services for the defendant, at the special instance and request of defendant and that said services consisted of and in hauling workmen, material and supplies of and for the defendant to and from the city of Philipsburg and the Barnard-Curtiss construction camp on the East Fork of Rock Creek, all in the County of Granite, State of Montana. [9]

3.

That the said services so rendered by the plaintiff for the defendant herein was and is reasonably worth Sixty-four ($64.00) Dollars.

4.

That the defendant has not paid the same nor any part thereof, and there now remains due and unpaid to the plaintiff from the defendant on account of said services the sum of Sixty-four ($64.00) Dollars, together with interest thereon at the rate of six per cent. per annum since the 2nd day of October, 1936, no part of which has been paid.

Sixth

For a sixth cause of action against the defendant herein plaintiff complains and alleges:—

1.

That at all of the times hereinafter mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That between the 15th day of September, 1936, and the 9th day of November 1936, inclusive, at the Barnard-Curtiss Construction Camp on the East Fork of Rock Creek, in Granite County, Montana, the plaintiff performed services for the defendant, at the special instance and request of [10] defendant, as Superintendent and Foreman in the building and construction of camp buildings at the above named construction camp.

3.

That defendant promised and agreed to pay plaintiff for said services. One and 20/100 ($1.20) Dollars per hour, and during said period plaintiff worked and performed services for defendant, as

aforesaid, a total of 423 hours and earned the sum of Five Hundred Seven and 60/100 ($507.60) Dollars, which said sum the defendant promised and agreed to pay to the plaintiff for said work and services.

4.

That the defendant has not paid the same nor any part thereof except the sum of Three Hundred Fifty-nine and 55/100 ($359.55) Dollars, and that there now remains due and unpaid from the defendant to the plaintiff for and on account of said work and services the sum of One Hundred Forty-eight and 5/100 ($148.05) Dollars, together with interest thereon at the rate of six per cent. per annum since the 9th day of November, 1936, no part of which has been paid to the plaintiff herein.

Seventh.

For a seventh cause of action against the defendant herein plaintiff complains and alleges:

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the [11] times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That on or about the 23rd day of August, 1936, at Philipsburg, Granite County, Montana, the plaintiff, at the special instance and request of the defendant, delivered to the defendant certain tools, machines and merchandise for use by defendant in the construction of a certain dam and reservoir on the East Fork of Rock Creek, in Granite County, Montana, which said tools, machines and merchandise and the value thereof is as follows, to-wit: 16 axes, value $46.30; 2 cant hooks, value $6.00; 6 wedges, value $1.00; 2 single jacks, value $3.00; 3 saw handles, value $1.50; 2 skidding chains, value $3.00; 1 pair chain tongs, value $9.00; 1 log chain, value $12.00; and 10 pieces 2 inches by 12 inches and 16 feet long planks, value $9.60, all of the value of Ninety-one and 40/100 ($91.40) Dollars, and that defendant promised and agreed to return the said tools, machines and merchandise to the plaintiff within a reasonable time after said 23rd day of August, 1936, or to pay the plaintiff the reasonable value thereof.

3.

That a reasonable time for the defendant to return the said tools, machines and merchandise to the plaintiff has elapsed before the commencement of this action and the defendant has failed to return the said tools, machines and merchandise, or any part thereof, to the plaintiff and defendant has not paid the plaintiff for the same or for any part thereof. [12]

4.

That the reasonable value of the said tools, machines and merchandise delivered to the defendant by the plaintiff, as aforesaid, is the sum of Ninety-one and 40/100 ($91.40) Dollars, and the defendant has not paid the same to the plaintiff, nor any part thereof, and there now remains due and owing to the plaintiff from the defendant, for and on account of said tools, machines and merchandise delivered to the defendant, as aforesaid, the sum of Ninety-one and 40/100 ($91.40) Dollars, together with interest thereon at the rate of six per cent. per annum since the 26th day of August, 1936, no part of which has been paid.

Wherefore, plaintiff prays for judgment against the defendant, as follows, to-wit:

1. For the sum of $3,439.70, together with interest thereon at six per cent. per annum since the 17th day of January, 1937. 2. For the sum of $1,300.00, together with interest thereon at six per cent. per annum since the 1st day of October, 1936. 3. For the sum of $424.00, together with interest thereon at six per cent. per annum since the 17th day of January, 1937. 4. For the sum of $105.60, together with interest thereon at six per cent. per annum since the 21st day of August, 1936. 5. For the sum of $64.00, together with interest thereon at six per cent. per annum since the 2nd day of October, 1936. 6. For the sum of $148.05, together with interest thereon at six per cent. per annum since the 9th day of November, 1936, and

7. For the sum of $91.40 together with interest thereon at six per cent. per annum since the 26th day of August, 1936.

And for plaintiff's costs herein incurred.

J. J. McDONALD
Philipsburg, Montana,
Attorney for Plaintiff. [13]

State of Montana,
County of Granite,—ss.

Ernest Maehl, of Philipsburg, Granite County, Montana, being first duly sworn deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein alleged to be on information and belief and that as to those matters he believes it to be true.

ERNEST MAEHL

Subscribed and sworn to before me at Philipsburg, Granite County, Montana, this the 12th day of April, 1938.

[Notarial Seal] J. J. McDONALD
Notary Public for the State of Montana, residing at Philipsburg, Montana.

My commission expires on June 22, 1938.

[Endorsed]: Filed in State Court April 14, 1938. Removed and filed in Federal Court, May 6, 1938. C. R. Garlow, Clerk. [14]

Thereafter, on May 6, 1938, demurrer to complaint, was filed in the above-entitled court, being in the words and figures following, to-wit: [15]

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite.

ERNEST MAEHL,

Plaintiff

vs.

BARNARD-CURTIS COMPANY,
a corporation,

Defendant.

DEMURRER

Now comes the defendant in the above entitled action and demurs to the complaint of plaintiff on file herein upon the grounds and for the reasons:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

The defendant demurs particularly to that portion of the complaint set out as a first cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

III.

The defendant demurs particularly to that portion of said complaint set out as a second cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant. [16]

IV.

The defendant demurs particularly to that portion of said complaint set out as a third cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

V.

The defendant demurs particularly to that portion of said complaint set out as a fourth cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

VI.

The defendant demurs particularly to that portion of said complaint set out as a fifth cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

VII.

The defendant demurs particularly to that portion of said complaint set out as a sixth cause of action upon the ground and for the reason that the

same does not state facts sufficient to constitute a cause of action against the defendant.

VIII.

The defendant demurs particularly to that portion of said complaint set out as a seventh cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant. [17]

The foregoing demurrer is filed in the above entitled action at the time of filing of defendant's petition and bond for the removal of the above entitled action to the United States District Court for the District of Montana, and without waiving any of its rights as set forth in said petition for removal and without submitting itself to the jurisdiction of the above entitled court in any particular but solely for the purpose of preventing and avoiding the default by the defendant in the above entitled action in any manner whatsoever.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant.

[Endorsed]: Filed in State Court April 29, 1938. Removed and filed in Federal Court May 6, 1938. C. R. Garlow, Clerk. [18]

Thereafter, on May 6, 1938, the Order Removing Case to Federal Court, was filed in the above-entitled court, being in the words and figures following, to-wit: [19]

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite.

ERNEST MAEHL,

Plaintiff

vs.

BARNARD-CURTIS COMPANY,
a corporation,

Defendant.

ORDER

The defendant herein, having, within the time provided by law, filed its petition for removal in this cause to the District Court of the United States for the District of Montana, and having at the same time offered its bond in the sum of Five Hundred and no/100 ($500.00) Dollars, with good and sufficient surety, pursuant to statute, and conditioned to law;

It is ordered by the Court that said Petition be accepted; that said Bond be approved and accepted; that this cause be removed for trial to the District Court of the United States for the District of Montana, pursuant to the statute of the United States; and that all other proceedings in this Court be stayed.

Dated this 3rd day of May, 1938.

R. E. McHUGH
Judge

[Endorsed]: Removed and filed in Federal Court, May 6, 1938. C. R. Garlow, Clerk. [20]

Thereafter, on October 1, 1938, the Order of the Court Overruling Demurrer was duly made and entered herein, the minute entry of said order being in the words and figures following, to-wit: [21]

In the District Court of the United States in and for the District of Montana.

No. 1714

ERNEST MAEHL vs. BARNARD-CURTIS CO.

This cause was duly called for hearing this day on demurrer to the complaint, Mr. J. J. McDonald appearing for the plaintiff and Mr. Howard Toole appearing for the defendant. Thereupon, on the statement of Mr. Toole that an answer has now been filed herein, court ordered that the record in this case show that an answer having been filed and counsel for defendant having stated in open court that there was thereby a waiver of the demurrer, said demurrer was by the court overruled. Thereupon, after hearing the statements of counsel, court ordered that the setting of the case for trial be passed for the present.

Entered in open court at Missoula, Montana, October 1, 1938.

C. R. GARLOW,
Clerk. [22]

Thereafter, on October 1, 1938, Answer was duly filed herein, being in the words and figures following, to-wit: [23]

In the District Court of the United States for the District of Montana, Missoula Division.

No. 1714

ERNEST MAEHL,

Plaintiff

vs.

BARNARD-CURTIS COMPANY,
a corporation,

Defendant.

ANSWER

Now comes the defendant, Barnard-Curtis Company and in answer to the first cause of action of plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's first cause of action.

II.

Defendant denies each, every and all of the allegations of paragraphs 2, 3 and 4 of plaintiff's first cause of action.

Answering Plaintiff's Second Cause of Action, this Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's second cause of action. [24]

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's second cause of action.

Answering Plaintiff's Third Cause of Action, This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's third cause of action.

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's third cause of action.

Answering Plaintiff's Fourth Cause of Action, This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's fourth cause of action.

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's fourth cause of action.

Answering Plaintiff's Fifth Cause of Action, This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's fifth cause of action.

II.

This defendant denies each, every and all of the alle- [25] gations contained in paragraphs 2, 3 and 4 of plaintiff's fifth cause of action.

Answering Plaintiff's Sixth Cause of Action, This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's sixth cause of action.

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's sixth cause of action.

Answering Plaintiff's Seventh Cause of Action, This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's seventh cause of action.

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's seventh cause of action.

III.

Defendant denies each, every and all of the allegations contained in plaintiff's complaint and not

hereinbefore specifically admitted, qualified or denied. [26]

Further Answering Plaintiff's Complaint and as a First Counter-claim Thereto, This Defendant Alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and duly qualified to engage in the business of general contracting within the State of Montana.

That in the month of July, 1936, defendant became the successful bidder and was awarded the contract for the construction of an earth and rock fill dam for the Montana State Water Conservation Board on Rock Creek in Granite County, Montana. That a part of the said contract required this defendant to clear and grub 6.98 acres of land on the damsite and that during the month of July, 1936, this defendant made a verbal agreement with the plaintiff Ernest Maehl to clear and grub the said 6.98 acres on said damsite as required by the plans and specifications attached to the said contract, and made a part thereof. That the said plaintiff, Ernest Maehl, undertook and agreed to furnish all of the labor, equipment and materials for the purpose of carrying out the terms and provisions of said verbal contract and that this defendant then and there agreed to pay the said Ernest Maehl the sum of One

Hundred ($100.00) Dollars per acre for the labor, equipment and materials so to be furnished by him.

II.

That the said Ernest Maehl entered upon the work then and there agreed by him to be performed but that before the said work had been completed and before the said 6.98 acres had been cleared and grubbed the said Ernest Maehl abandoned the same and failed to complete the work therein agreed upon. [27]

That during the progress of the work performed by the said Ernest Maehl this defendant advanced to the said plaintiff the sum of Seven Hundred Seventy-four and 45/100 ($774.45) Dollars.

That had the said plaintiff completed the said work provided for in said verbal agreement he would have earned the sum of Six Hundred Ninety-eight ($698.00) Dollars, but that by reason of his failure to complete the said verbal contract and to clear and grub the said 6.98 acres as agreed upon, this defendant was required to complete the same and that the total cost of completion to this defendant was the sum of Seven Hundred Seventy-four and 45/100 ($774.45) Dollars.

That by reason thereof this defendant was damaged by the failure of the said Ernest Maehl to enter upon and complete the said clearing and grubbing as agreed upon by him, and that the damage sustained by this defendant was and is the sum of

Seven Hundred Seventy-four and 45/100 ($774.45) Dollars.

III.

That by reason thereof there is due, owing and unpaid from the plaintiff to this defendant the sum of Seven Hundred Seventy-four and 45/100 ($774.45) Dollars.

Further Answering Plaintiff's Complaint and as a Further Defense and Second Counter-claim Thereto, This Defendant Alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and duly qualified to engage in the business of general contracting within the State of Montana. [28]

That during the month of July, 1936, this defendant became the successful bidder and was awarded the contract for the construction of an earth and rock fill dam for the Montana State Water Conservation Board on Flint Creek, in Granite County, Montana.

That as a part of the work under said contract this defendant was required to clear the timber from approximately 50 acres of land on the east end of the reservoir site on said project.

II.

That on the 18th day of January, 1937, this defendant made and entered into a written contract

with the plaintiff, Ernest Maehl, wherein and whereby the said plaintiff and the defendant agreed that plaintiff would clear said 50 acre tract and remove the timber therefrom and defendant would pay plaintiff the sum of One Hundred ($100.00) Dollars per acre for such clearing. That a true and exact copy of said contract marked Exhibit "A" is hereunto attached and by reference thereto made a part hereof.

That the plaintiff Ernest Maehl, entered upon said clearing contract but that after having cleared 24 acres thereof the said plaintiff abandoned and breached said contract and failed and refused to proceed any further with the clearing thereof and that this defendant thereupon was required to complete the said clearing and did actually take over the said clearing and complete the same.

That the plaintiff, Ernest Maehl, earned under the said contract the sum of Two Thousand Seven Hundred and 33/100 ($2,700.33) Dollars but that the defendant herein advanced and loaned unto said plaintiff the sum of Four [29] Thousand Seven Hundred Seventy-nine and 84/100 ($4,779.84) Dollars and that at the time of the abandonment of said contract by the plaintiff there was due, owing and unpaid to this defendant from the said plaintiff the sum of Two Thousand Seventy-nine and 51/100 ($2,079.51) Dollars.

That when the said plaintiff, Ernest Maehl, abandoned the said contract and breached the same and

failed to proceed with the said clearing, this defendant was requried under its contract with the Montana State Water Conservation Board to take over and complete the said clearing and that this defendant did take over and complete the clearing of the said 50 acre tract and expended in labor, materials and supplies the sum of Six Thousand Eight Hundred Sixty-two and 85/100 ($6,862.85) Dollars in completing the contract so abandoned and breached by the said Ernest Maehl.

III.

That by reason thereof this plaintiff was damaged by the failure of the said plaintiff, Ernest Maehl to complete the said contract, in the total sum of Eight Thousand Nine Hundred Forty-two and 36/100 ($8,942.36) Dollars, no part of which has been paid by the said plaintiff, Ernest Maehl and that by reason thereof there is due, owing and unpaid from the plaintiff to this defendant on its second counter-claim the sum of Eight Thousand Nine Hundred Forty-two and 36/100 ($8,942.36) Dollars.

Wherefore, this defendant prays judgment as follows:

(1) That plaintiff shall take nothing by his said complaint herein. [30]

(2) That defendant shall have judgment against the said plaintiff on its first counter-claim in the sum of Seven Hundred Seventy-four and 45/100 ($774.45) Dollars.

(3) That this defendant shall have judgment against the said plaintiff on its second

counter claim in the sum of Eight Thousand Nine Hundred Forty-two and 36/100 ($8,942.36) Dollars, and

(4) That defendant shall have judgment for its costs herein disbursed and expended.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant. [31]

United States of America
State of Montana
County of Missoula—ss.

Howard Toole, being first duly sworn on his oath, deposes and says:

That he is one of the attorneys for the defendant, Barnard-Curtis Company in the above entitled action, and makes this verification for and on behalf of said defendant for the reason that the defendant is a corporation and has no officer within the County where affiant resides and has his office; that he has read the foregoing Answer, knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

HOWARD TOOLE

Subscribed and sworn to before me this 30th day of Sept. 1938.

[Seal] W. T. BOONE
Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires Aug. 2, 1941.

Service of the within answer is hereby acknowledged and copy received this 1st day of October, 1938.

J. J. McDONALD
Atty. for Ptf. [32]

EXHIBIT "A"

CLEARING CONTRACT

This agreement, made and entered into this 18th day of January 1937 by and between Barnard-Curtiss Company of Minneapolis Minnesota as party of the first part and Ernest Maehl of Philipsburg Montana as party of the second part, Witnesseth:

That Whereas, the party of the first part has entered into a contract with the Montana State Water Conservation Board to construct the Flint Creek Dam and whereas the party of the second part desires to subcontract from the First Party the clearing of approximately fifty (50) acres on the East end of the reservoir site on said project, to all of which the party of the first part is agreeable.

Now therefore, in that behalf and in consideration of the promises by each party hereto to the other party made, it is agreed as follows:

The Party of the Second part shall, perform all of the said work in full compliance with the contract between the first party and the State of Montana for said work, all, in accordance with the plans and specifications requirements and instructions made furnished or given by said Montana State

Water Conservation board or the engineer in charge of said work, it being clearly the intent and purpose of this agreement that the party of the second part shall be subject to and bound by all of the provisions and conditions of the contract between the State of Montana and the party of the first part, which contract with proposals, plans and specifications covering said project are, hereby made a binding part of this agreement.

Now Therefore, in consideration of the faithful performance of the said work herein specified by the party of the second part and within the time hereinafter set forth the party of the first part will pay and the party of the second part will accept as full and satisfactory compensation for said work the following prices:

For Clearing approximately Fifty acres of Reservoir site @ $100.00 per acre.

Payment will be made on the final estimate of the engineer in charge as furnished by the State Water Conservation Board and final payment has been made to Party of the first part.

It is understood and agreed that the Party of the first part will pay Labor and other costs as the work progresses and all such costs including wages of the party of the second part, compensation nsurance, bond, public liability Insurance, office expense, social security Tax and Old *Old* Age pension tax and any other charges which are proper [33] against the work, will be deducted from final payment to the party of the second part. A special condition of this

agreement is that if at any time in the judgment of the engineer in charge or the party of the first part, the work is not being properly managed or conducted, or not carried on in accordance with the specifications and requirements, or if the work is progressing too slow to warrant the completion within the time specified, the party of the first part has the right to put on necessary equipment, hire labor, purchase materials, and supplies, pay for the same and charge all such expenditures to the party of the second part and deduct the same from any money which may become due him.

It is also a special condition of this agreement that the party of the first part has the right to remove and dispose of any timber on the said project in lieu of burning by the party of the second part.

The party of the second part agrees to give his full personal time and attention in supervising the said work in order to facilitate progress at all times, that he will commence operations at once and the said work on or before March 15th 1937.

Executed as of the day and year first above written.

Signed
BARNARD-CURTISS CO.
By J. A. BARNARD
ERNEST MAEHL

Witnesses
H. E. MARTIN
H. E. MARTIN

[Endorsed]: Filed Oct. 1, 1938 [34]

Thereafter, on April 5, 1939, Reply to Counterclaims Contained in Defendant's Answer, was duly filed herein, being in the words and figures following, to-wit: [35]

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIMS CONTAINED IN DEFENDANT'S ANSWER

For reply to the first counterclaim contained in defendant's answer, plaintiff admits, denies and alleges as follows, to-wit:

I.

Admits that the defendant is a corporation, organized and existing under the laws of the State of Minnesota and qualified to do business in Montana.

Admits that the defendant was awarded a contract for the construction of a dam for the Montana State Water Conservation Board on Rock Creek in Granite County, Montana.

Admits that the defendant made a verbal agreement with the plaintiff, Ernest Maehl, to clear and grub 6.98 acres on the dam-site and that Ernest Maehl agreed to furnish labor, materials and equipment for the purpose of carrying out said verbal contract and, in this connection, plaintiff alleges that the 6.98 acres to be cleared and grubbed as aforesaid was merely a portion of 118 acres which the plaintiff agreed to clear at the contract price of One Hundred Dollars ($100.00) per acre. [36]

II.

Admits that plaintiff, Ernest Maehl, entered upon the work agreed by him to perform.

Admits that the defendant advanced to the plaintiff the sum of Seven Hundred Seventy-four Dollars and Forty-five Cents ($774.45) but, in this connection, alleges that the said sum so advanced was merely a portion of a larger sum advanced on the entire contract to clear said 118 acres.

Denies each and every other allegation, matter and thing contained in Paragraph II of said first counterclaim.

III.

Denies each and every allegation, matter and thing contained in Paragraph III of said first counterclaim.

Further Replying to Defendant's Second Counterclaim as Contained in Defendant's Answer, This Plaintiff Admits, Denies and Alleges:

I.

Admits the allegations of Paragraph I of said second counterclaim contained in defendant's answer.

II.

Admits that, on the 18th day of January, 1937, the defendant made and entered into a written contract with the plaintiff wherein and whereby the plaintiff agreed that the plaintiff would clear said

50-acre tract and remove the timber therefrom and that the defendant would pay the plaintiff the sum of One Hundred Dollars ($100.00) per acre for such clearing. Admits that Exhibit "A" attached to defendant's answer is a true and exact copy of said contract. [37]

Admits that the plaintiff, Ernest Maehl, entered into said clearing contract and, having cleared 24 acres of said lands, in this connection alleges that the plaintiff partially cleared an additional 12 acres thereof.

Denies that the plaintiff earned under said contract the sum of Two Thousand Seven Hundred Dollars and Thirty-three Cents ($2,700.33) and in this connection alleges that the plaintiff earned in excess of said sum. Alleges that the plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment that the defendant advanced the plaintiff the sum of Four Thousand Seven Hundred Seventy-nine Dollars and Eighty-four Cents ($4,779.84) and, in this connection, alleges to the best knowledge and information of the plaintiff that the defendant advanced the sum of Four Thousand Two Hundred Twenty-one Dollars and Fifty Cents ($4,221.50).

Denies each and every allegation, matter and thing contained in Paragraph II of said second counterclaim not herein specifically admitted or denied.

III.

Denies each and every allegation, matter and thing contained in Paragraph III of said second counterclaim.

Further Replying to Said Second Counterclaim and by Way of an Affirmative Defense Thereto, Plaintiff Alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and duly qualified to engage in business in the State of Montana.

II.

That, on or about the 18th day of January, 1937, plain- [38] tiff and defendant entered into a contract, a copy of which is attached to defendant's answer as Exhibit "A" and by this reference made a part hereof.

III.

That, on or about the 18th day of January, 1937, the plaintiff entered into and upon the performance of the work contemplated by said contract and cleared 24 acres of the lands involved in said contract and partially cleared an additional 12 acres of the lands involved in said contract.

That, on or about the 12th day of March, 1937, it was orally agreed and understood by and between the plaintiff and the defendant, by and through its agents thereunto duly authorized, that the written

contract of January 18, 1937 be mutually abandoned and rescinded and that, pursuant to said agreement and understanding, said contract was abandoned and rescinded and all rights and liabilities of both parties to said contract, arising out of said contract, were thereupon discharged.

Wherefore, having fully replied, plaintiff prays that defendant take nothing by its counterclaims and that the plaintiff have judgment as prayed in the cause.

J. J. McDONALD
WALTER L. POPE
RUSSELL E. SMITH
KENDRICK SMITH
Attorneys for Plaintiff [39]

DEMAND

Demand is hereby made of a trial by jury of all of the issues triable of right by a jury in the above entitled cause.

J. J. McDONALD
WALTER L. POPE
RUSSELL E. SMITH
KENDRICK SMITH
Attorneys for Plaintiff

Service of a copy of the foregoing reply and demand acknowledged this 3rd day of April, 1939.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant.

[Endorsed]: Filed April 5, 1939. [40]

Thereafter, on April 11, 1939, motion for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the above entitled action, (excepting exhibits A, B and C, which are omitted by the designation of Appellant,) was duly filed herein, being in the words and figures following, to-wit: [41]

In the District Court of the United States for the District of Montana, Missoula Division.

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY,
a corporation,

Defendant,

C. A. METCALF,

Third Party.

MOTION FOR LEAVE TO SERVE SUMMONS AND COMPLAINT ON C. A. METCALF AND TO MAKE HIM A THIRD PARTY TO THE ABOVE ENTITLED ACTION.

Comes now the defendant Barnard-Curtiss Company, a corporation, and moves this Honorable Court for an order on five days notice to the plaintiff for leave to serve summons and complaint in this action upon C. A. Metcalf, an individual residing in Granite County, Montana, within the juris-

diction of this Court, said C. A. Metcalf being a person who is not a party to this action but who is or may be liable to this defendant or to the plaintiff for all or part of the claim of the plaintiff Ernest Maehl against this defendant, or liable to this defendant on its counter-claim against the plaintiff Ernest Maehl.

This motion is based upon the following documents:

1. The complaint in this action, to-wit, the complaint of Ernest Maehl filed against this defendant in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, and on motion of the defendant removed to the above entitled Court (Exhibit A). [42]

2. The answer of this defendant Barnard-Curtiss Company, a corporation, to the said complaint of the Plaintiff Ernest Maehl (Exhibit B).

3. The reply of the plaintiff Ernest Maehl to the answer of this defendant in this action (Exhibit C).

4. The complaint of C. A. Metcalf filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite (Exhibit D).

5. The complaint in the case of C. A. Metcalf vs. Barnard-Curtiss Company filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, in a second action (Exhibit E).

6. Upon the affidavit of James Barnard, one of the officers of the defendant corporation (Exhibit F).

In further support of this motion the defendant Barnard-Curtiss Company, a corporation, alleges:

That it appears from the complaint of the plaintiff Ernest Maehl (Exhibit A) that the said plaintiff in his first cause of action seeks to recover the sum of Three Thousand Four Hundred Thirty-nine and 70/100 Dollars ($3439.70) from this defendant under an alleged verbal contract for clearing certain lands in Granite County, Montana, and it likewise appears from the complaint of C. A. Metcalf (Exhibit D) that he seeks to recover the sum of Two Thousand Nine Hundred Ninety Dollars ($2990.00) from this defendant in the District Court in Granite County, Montana, for clearing the same land as that referred to in the complaint of Ernest Maehl.

That it appears from the third cause of action in the complaint of Ernest Maehl (Exhibit A) that he seeks to recover from this defendant the sum of Four Hundred Twenty-four Dollars [43] ($424.00) for allegedly cutting six thousand (6000) stulls on the lands above referred to, and that it appears from the second complaint of C. A. Metcalf (Exhibit E) that he likewise seeks to recover the sum of Four Hundred Ten Dollars ($410.00) from this defendant for the same six thousand (6000) stulls referred to in the complaint of Ernest Maehl.

That it appears from the answer of this defendant that it denies the making of the contracts referred to in the complaint of Ernest Maehl (Exhibit A) and in its answer (Exhibit B) counter-claims in two separate counter-claims against Ernest Maehl in the respective amounts of Seven Hundred Seventy-four and 45/100 Dollars ($774.45) and Eight Thousand Nine Hundred Forty-two and 36/100 Dollars ($8942.36).

That it cannot be determined without joining C. A. Metcalf as a party to this action who is or may be liable to this defendant either under the contracts alleged in this defendant's answer (Exhibit B) or under the purported contracts alleged in the complaint of the plaintiff Ernest Maehl (Exhibit A) or the two complaints of the said C. A. Metcalf (Exhibits D and E), and that while this defendant denies any liability either to Ernest Maehl or C. A. Metcalf it cannot be determined without joining said C. A. Metcalf to whom defendant may be liable if any liability exists.

That the presence of said C. A. Metcalf is required in the original action for the granting of complete relief in the determination of defendant's counter-claim and that jurisdiction can be obtained and that his joinder will not deprive the Court of jurisdiction of this action.

That the answer of the defendant has been filed and [44] that this motion is being made on five days notice to the plaintiff.

Wherefore, this defendant moves that this Court shall order that the said C. A. Metcalf be served

with summons and complaint in the above entitled action, and be made a party hereto.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant. [45]

EXHIBIT D

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite.

C. A. METCALF,

Plaintiff,

vs.

BARNARD-CURTIS COMPANY,
a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows, to-wit:

1.

That at all of the times herein mentioned, the defendant was, continued to be and now is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of Montana.

2.

That on or about the 1st day of September, 1936, the plaintiff and the defendant entered into a certain contract and agreement, in Granite County, Montana, wherein and whereby it was mutually agreed between them that the plaintiff would cut and burn the timber then on certain land to be designated by the defendant, lying approximately twenty miles south of Philipsburg, Granite County, Montana, in the vicinity of a dam then being constructed on the East Fork of Rock Creek, in said County, by the defendant, and that the defendant would pay to the plaintiff for cutting and burning such timber, [46] when the said work was completed the sum of One Hundred ($100.00) Dollars per acre, and it was further mutually understood, promised and agreed that the plaintiff would clear, burn and grub the timber on certain land situated in the same vicinity as that hereinabove described, as designated by the defendant, and the defendant would pay to the plaintiff the reasonable value of the clearing, burning and grubbing the said land of timber. That said contract and agreement hereinabove referred to was oral and was not in writing.

3.

That thereafter and on or about the 7th day of October, 1936, this plaintiff in pursuance to said contract entered into and upon the land pointed out to him and designated by the defendant as the land

and premises from which plaintiff was to cut and burn the timber thereon, as provided in said contract and agreement, and commenced to cut and burn the timber thereon, and continued to cut and burn the timber thereon, from said last mentioned date until the 18th day of January, 1937, at which time he had completely performed all the things required of him to be performed by the terms of said contract, and had cut and burned all timber on said land, and that between said last mentioned dates the plaintiff cut and burned the timber upon Ninety-eight and 56/100 (98.56) acres of land so designated by the defendant, and for which the defendant had promised and agreed to pay to this plaintiff the total sum of Nine Thousand Eight Hundred Fifty-six ($9856.00) Dollars; that also between the said last mentioned dates, the plaintiff cleared, burned and grubbed the timber upon Nine and one-half acres of land, designated by the defendant, as he had agreed to do, and the reasonable value of [47] doing such work and labor, that the defendant promised and agreed to pay was and is the sum of One Thousand Four Hundred Twenty-five ($1,425.00) Dollars.

4.

That the said sum of Nine Thousand Eight Hundred Fifty-six ($9,856.00) Dollars, and the One Thousand Four Hundred Twenty-five ($1,425.00) Dollars, became due, owing and payable from the defendant, to this plaintiff, on the said 18th day of

January, 1937, but that the defendant has not paid the same, or any part thereof, save and except the sum of Eight Thousand Two Hundred Ninety-one ($8,291.00) Dollars, and there is now due, owing and wholly unpaid from the defendant to this plaintiff, the sum of Two Thousand Nine Hundred Ninety ($2,990.00) Dollars, which the defendant refuses to pay although demand has been made upon it for such payment, prior to the commencement of this action.

5.

That the said agreement hereinabove set out was made in, was to be, and was, performed in Granite County, Montana, and the plaintiff herein duly and regularly performed all the conditions precedent on his part to be performed under the terms and conditions of said contract and agreement.

11.

For a second and other count and statement of his cause of action the plaintiff complains and alleges;

1.

That at all of the times herein mentioned, the defendant was, continued to be and now is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of [48] Montana.

2.

That between the 1st day of September, 1936, and the 18th day of January, 1937, the plaintiff, at the

special instance and request of the defendant, and for its use and benefit performed work and labor for the defendant and rendered services to the defendant, in cutting and burning the timber then on certain land lying approximately twenty miles south of Philipsburg, Granite County, Montana, in the vicinity of a dam on the East Fork of Rock Creek, in said County, then being constructed by the said defendant, and in clearing, burning and grubbing the timber on certain land, lying in the same vicinity, that the said work and labor performed and services rendered by the plaintiff to the defendant, was and is the sum of Eleven Thousand Two Hundred Eighty-one ($11,281.00) and the said defendant agreed and promised to pay to this plaintiff the reasonable value of his work and labor performed and services rendered, in doing the work and labor and performing the services hereinabove set out.

3.

That the reasonable value of the work and labor so performed by plaintiff for defendant, and the services so rendered was and is the sum of Eleven Thousand Two Hundred Eighty-one ($11,281.00) Dollars, which the said defendant promised and agreed to pay. That said sum became due, owing and payable from the defendant to this plaintiff on the 18th day of January, 1937, but the defendant failed, refused and neglected to pay the same, or any part thereof, save and except the sum of Eight Thousand Two Hundred Ninety-one ($8,291.00)

Dollars, and there is now due, owing and wholly unpaid from [49] the defendant to this plaintiff, the sum of Two Thousand Nine Hundred Ninety ($2,990.00) Dollars, which the defendant refuses to pay although demand has been made upon it for such payment prior to the institution of this action.

3.

Plaintiff alleges that while he has stated his cause of action against the defendant in separate counts, he has but the one cause of action against the said defendant for the total sum of Two Thousand Nine Hundred Ninety ($2,990.00) Dollars, and no more, and does not claim or assert to be entitled to recover any other or greater sum.

Wherefore, Plaintiff prays judgment against the defendant for the sum of Two Thousand Nine Hundred Ninety ($2,990.00) Dollars, together with his costs of suit herein expended.

R. LEWIS BROWN
Attorney for Plaintiff. [50]

State of Montana
County of Granite—ss.

C. A. Metcalf, being first duly sworn, on his oath says:

That he is the plaintiff named in the foregoing complaint, that he has read the same and knows its contents and that the matters and facts therein stated are true.

C. A. METCALF

Subscribed and sworn to before me this 20 day of July, 1938.

[Court Seal] E. J. DONNELLY
Clerk of the District Court. [51]

EXHIBIT E

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite.

C. A. METCALF,

Plaintiff,

vs.

BARNARD-CURTIS COMPANY,
a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action against the defendant complains and alleges as follows, to-wit:

1.

That at all of the times herein mentioned the defendant was, continued to be and now is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of Montana.

2.

That between the 7th day of October, 1936, and the 18th day of January, 1937, the plaintiff at the special instance and request of the defendant, sold and delivered to the defendant, in Granite County, Montana, approximately Six Thousand (6,000) stulls, of the reasonable value of Four Hundred Ten ($410.00) Dollars, and which said reasonable value the defendant promised and agreed to pay.

3.

That the said sum of Four Hundred Ten ($410.00) [52] Dollars, became due, owing and payable on the 18th day of January, 1937, to this plaintiff, but the defendant, notwithstanding such fact, has wholly failed, refused and neglected to pay said sum or any part thereof, and there is now due, owing and wholly unpaid by the defendant to this plaintiff, the sum of Four Hundred Ten ($410.00) Dollars, with interest thereon at the rate of eight per cent per annum from said 18th day of January, 1937, which the said defendant refuses to pay although demand for payment has been made upon it prior to the institution of this action.

11.

For a second and other cause of action in favor of the plaintiff and against the defendant, the plaintiff complains and:

1.

That at all of the times herein mentioned, the defendant was, continues to be and now is a corpora-

tion organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of Montana.

2.

That between the 1st day of December, 1936, and the 9th day of May, 1937, at the special instance and request of the defendant, the plaintiff rented to the defendant, and the defendant hired from the plaintiff, certain work horses, the property of the plaintiff, and for which the defendant promised and agreed to pay the reasonable value of the rental and hiring of said horses.

3.

That the sum of One Hundred Seventy-nine ($179.00) [53] Dollars is and was a reasonable sum for the defendant to pay for said horses and for their use and hire, and that the said sum of One Hundred Seventy-nine ($179.00) Dollars, became due, owing and payable to this plaintiff from the defendant, on the said 9th day of May, 1937, but the defendant has failed, refused and neglected to pay the same, or any part thereof, although demand has been made upon it so to do, and there is now due, owing and wholly unpaid from the defendant to this plaintiff, the sum of One Hundred Seventy-nine and no/100 ($179.00) Dollars, with interest thereon at the rate of eight per cent per annum from the said 9th day of May, 1937.

Wherefore, Plaintiff prays judgment against the defendant for the sum of Four Hundred Ten

($410.00) Dollars, with interest thereon at the rate of eight per cent per annum from the 18th day of January, 1937, as set out in his first cause of action;

For the sum of One Hundred Seventy-nine ($179.00) Dollars, with interest thereon at the rate of eight per cent per annum from the 9th day of May, 1937, as set out in his second cause of action, and for his costs of suit herein expended.

R. LEWIS BROWN
Attorney for Plaintiff. [54]

State of Montana,
County of Granite—ss.

C. A. Metcalf, being first duly sworn, on his oath says;

That he is the plaintiff named in the foregoing complaint, that he has read the same and knows its contents and that the matters and facts therein stated are true.

C. A. METCALF

Subscribed and sworn to before me this 20 day of July, 1938.

[Court Seal] E. J. DONNELLY
Clerk of the District Court. [55]

EXHIBIT F

In the District Court of the United States for the District of Montana, Missoula Division.

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY,
a corporation,

Defendant,

C. A. METCALF,

Third Party.

AFFIDAVIT OF J. A. BARNARD

United States of America
State of Montana
County of Missoula—ss.

J. A. Barnard, being first duly sworn, deposes and says:

That he is Secretary-Treasurer of Barnard-Curtiss Company, a corporation, and that he is and has been in the general control and mangement of said corporation for a period of ten years or more. That as such Secretary-Treasurer he is familiar with the contract between Barnard-Curtiss Company and the Montana State Water Conservation Board for the construction of the Flint Creek dam on Rock Creek in Granite County, Montana, and likewise familiar with all of the work done and performed in carry-

ing out the terms and conditions of said contract. That he is personally acquainted with Ernest Maehl and C. A. Metcalf, parties to the above entitled action. That all of the clearing and grubbing [56] referred to in the complaint of Ernest Maehl (Exhibit A) attached to the motion herein referred to and all of the clearing and grubbing referred to in the complaint of C. A. Metcalf (Exhibit D) attached to the motion herein referred to is and was clearing and grubbing upon identical lands. That the six thousand (6000) stulls referred to in the complaint of Ernest Maehl (Exhibit A) in the third cause of action and the six thousand (6000) stulls referred to in the complaint of C. A. Metcalf (Exhibit E) are identical stulls.

That Barnard-Curtiss Company denies that it is obligated or indebted to either Ernest Maehl or C. A. Metcalf but that said Ernest Maehl and C. A. Metcalf are each making demands upon Barnard-Curtiss Company for payment for clearing and grubbing the identical lands above referred to, and that each of said persons claims to have had contracts for clearing and grubbing said lands and that the lands referred to in said contracts are in the main identical lands. That Barnard-Curtiss Company denies that it is liable or obligated to either C. A. Metcalf or Ernest Maehl for the stulls referred to in said Exhibits but that both of said persons are claiming against Barnard-Curtiss Company under separate alleged contracts for having furnished said stulls.

That Barnard-Curtiss Company denies that it is obligated to either Ernest Maehl or C. A. Metcalf in any respect under any contracts whatsoever and alleges in its answer in the above entitled action (Exhibit B) that it has certain counter-claims in connection with contracts for clearing and grubbing the lands referred to and that said counter-claims are valid counter-claims. [57]

That it cannot be determined without joinder of C. A. Metcalf in the above entitled action what obligations or indebtedness exist between the parties unless the said C. A. Metcalf shall be joined as a party.

That C. A. Metcalf may be liable to this defendant upon said counter-claims and that his presence in this action is required for the granting of complete relief in the determination of this defendant's counter-claims.

That this affidavit is made in support of the motion of defendant Barnard-Curtiss Company to join the said C. A. Metcalf as a party to the above entitled action.

J. A. BARNARD

Subscribed and sworn to before me this 4th day of April, 1939.

[Seal] HOWARD TOOLE

Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires January 30, 1942.

[Endorsed]: Filed April 11, 1939. [58]

Thereafter, on April 24, 1939, Order Denying Motion of Defendant to make C. A. Metcalf a Third Party, was duly filed herein, being in the words and figures following, to-wit: [59]

District Court of the United States, District of Montana, Missoula Division.

No. 1714

ERNEST MAEHL,

Plaintiff,

v.

BARNARD-CURTIS COMPANY,
a corporation,

Defendant.

ORDER

The motion of the defendant Barnard-Curtis Company, a corporation, for leave to serve summons and complaint upon C. A. Metcalf and to make him a third party to the above entitled action, filed herein on April 11, 1939, is hereby denied.

Done in open court at Butte, Montana, April 24, 1939.

JAMES H. BALDWIN
United States District Judge
District of Montana.

[Endorsed]: Filed and Entered April 24, 1939 [60]

Thereafter, on September 28, 1939, Motion to Refer Case to a Master to Take Evidence, and Affidavit of Howard Toole in Support of Said Motion, was duly filed herein, being in the words and figures following, to-wit: [61]

[Title of District Court and Cause.]

MOTION FOR REFERENCE

Now comes the defendant Barnard-Curtiss Company and by and through its Attorneys, Howard Toole, Esq., and W. T. Boone, Esq., moves this Honorable Court to refer the above entitled action to a master for the purpose of taking the evidence in said action. This motion is based upon the pleadings in this action and upon all of the other documents and papers herein filed and upon the affidavit of Howard Toole, one of the Attorneys for the defendant herein.

Dated this 27th day of September, 1939.

HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant. [62]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
State of Montana
County of Missoula—ss.

Howard Toole, being first duly sworn, deposes and says:

That he is one of the attorneys for Barnard-Curtiss Company, a corporation, defendant in the above entitled action, and that this affidavit is made in support of motion for the appointment of a master to hear the evidence in the above entitled action. That the issues in said action are complicated and that certain exceptional conditions as hereinafter set forth require the submission of this action to a master.

That the conditions which require the submission of this action to a master are as follows: [63]

That the plaintiff Ernest Maehl in his complaint alleges seven separate causes of action each of which is based upon an alleged oral contract. That all of the said oral contracts alleged in plaintiff's complaint arise out of certain items of alleged labor, materials and equipment alleged by said plaintiff to have been furnished to the defendant under said alleged contracts during the course of the construction of a certain dam in Granite County, Montana.

That the defendant in its answer denies the existence of said contract but in two separate cross-complaints alleges the existence of two other contracts one of which is alleged to be a verbal contract and

the other of which is alleged to be a written contract.

That in each and every instance of the seven alleged contracts referred to in plaintiff's complaint, if plaintiff shall prove the existence of such contracts the defendant will be required to prove the existence of offsets in the form of advancements of monies and equipment and supplies furnished to the plaintiff and that likewise defendant will be required to prove the existence of advancements furnished to the plaintiff under the contracts set forth in defendant's cross-complaint.

That in each and all of the said contracts it will be necessary for the plaintiff and defendant to account both with respect to the sums alleged to have been earned by plaintiff and the advancements made by defendant and that such accounting will involve an examination of plaintiff's books of account and defendant's books of account and the examination of a great number of defendant's vouchers. [64]

That this is an action in which the issues are complicated because of the necessity for said accounting and that the conditions existing are exceptional because of said accounting and that said action should be referred to a special master.

HOWARD TOOLE

Subscribed and sworn to before me this 27th day of September, 1939.

[Seal] W. T. BOONE

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2, 1941.

Due and personal service and receipt of copy of the foregoing Motion for Reference and Affidavit is hereby accepted this 27th day of September, 1939.

RUSSELL E. SMITH
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 28, 1939. [65]

Thereafter, on October 5, 1939, Order of Court Denying Motion to Refer Case to a Master, was duly made and entered herein, the minute entry thereof being in the words and figures following, to-wit: [66]

[Title of District Court and Cause.]

This cause was duly called for hearing this day on defendant's motion to refer the case to a Master to take testimony, Mr. J. J. McDonald, Mr. Russell Smith and Mr. Allen Kendrick Smith appearing for the plaintiff, and Mr. Howard Toole appearing for defendant. Thereupon said motion was duly heard, argued and submitted; and, after due consideration, court ordered that said motion be and is denied. To this ruling of the court, the defendant then and there excepted and exception duly noted.

Entered in open court at Missoula, Montana, October 5, 1939.

C. R. GARLOW,
Clerk. [67]

Thereafter, on January 22, 1940, the Reporter's Transcript of Proceedings was duly filed herein, and is volume II of this transcript, numbered from page 69 to page 382, and is in the words and figures following, to-wit: [68]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED PROCEEDINGS AT THE TRIAL

(TESTIMONY)

Appearances:

For Plaintiff:

J. J. McDonald,
Philipsburg, Montana;
Pope, Smith and Smith,
Missoula, Montana.

For Defendant:

Howard Toole and
W. T. Boone,
Missoula, Montana. [69]

[Title of District Court and Cause.]

Be It Remembered: That the above entitled cause came regularly on for trial at Missoula, Montana, on Saturday, the 14th day of October, 1939, at ten o'clock a. m., before the Honorable James H. Baldwin, Judge, and a jury duly and regularly empaneled and sworn to try said case. Plaintiff was represented by J. J. McDonald, attorney at law, of Phil-

ipsburg, Montana, and Messrs. Pope, Smith and Smith, attorneys at law, of Missoula, Montana. Defendant was represented by Howard Toole and W. T. Boone, attorneys at law, of Missoula, Montana.

Thereupon the following proceedings were had and taken and the following evidence and none other was introduced:

The case was regularly called for trial and both sides announced ready. A jury was drawn, examined, accepted and sworn to try the case. Thereupon opening statement on behalf of the plaintiff was made by Mr. Russell Smith.

And thereupon the following evidence was introduced by the plaintiff upon his case in chief. [72]

ERNEST MAEHL,

the plaintiff, was called as a witness in his own behalf and having been first duly sworn testified as follows:

Direct Examination

By Mr. Russell Smith:

Q. Will you state your name please?

A. Ernest Maehl.

Q. And where do you live Mr. Maehl?

A. Philipsburg, Granite County, Montana.

Q. How long have you lived in Philipsburg?

A. Twenty-eight years.

Q. And during that time what has your occupation been?

A. I follow contracting and jobbing.

(Testimony of Ernest Maehl.)

Q. During that course of time have you had any experience in logging work in the woods?

A. Yes sir.

Q. And how much experience in that type of work have you had?

A. Well I worked off and on in the woods practically all my lifetime—not steady.

Q. Are you acquainted with some of the officers of the Barnard-Curtiss Company?

A. Yes sir.

Q. Which of these officers do you know?

A. I think I know all of them.

Q. Who, if you know, is president of the Barnard-Curtiss Construction Company?

A. Jim Barnard.

Q. And when did you first become acquainted with Jim Barnard?

A. Along in 1933. [73]

Q. You are acquainted with what is known as East Fork job, are you not? A. Yes sir.

Q. What was that job?

A. Job of clearing dam site and reservoir site for *bring* water in the——

Q. When I told the jury that was Flint Creek I was mistaken, was I not?

A. Rock Creek—the water is brought into Flint Creek.

Q. Did you ever have any conversation with Mr. Jim Barnard with respect to the work to be done on this project? A. Yes sir.

(Testimony of Ernest Maehl.)

Q. When did you first talk with Mr. Jim Barnard about that?

A. In the fall of 1935 they was going——

Mr. Toole: Just a minute, that is objected to as not responsive.

Mr. Smith: I asked him when they first had a conversation.

Mr. Toole: That is right, in the fall of 1935.

Mr. Smith: Now then will you give us the substance of the conversation that you had with Jim Barnard at that time?

A. He come to me in Philipsburg one day and asked me—and wanted me to take my truck and go out and so we went out and looked the timber over and he asked me what I would clear the timber for. I told him $100.00 an acre and him to carry the overhead.

Q. Was anything said at that time about what the term overhead meant?

Mr. Toole: Just a minute, he asked you what he said.

Q. I didn't ask you what you think the term means, I asked you if anything was said. [74]

A. It was, yes.

Mr. Toole: Just a minute, if you Honor please, I object to any questions about what was supposed to have been said in respect to overhead as not within the issues and not pleaded.

Mr. Smith: Just tell us Mr. Maehl, what Mr. Barnard said and what you said.

(Testimony of Ernest Maehl.)

A. He asked me what I was going to clear it for and I said $100.00 and he could put in his bid according to that.

Q. Now then you were to clear it for $100.00. What were you to furnish?

Mr. Toole: Now just a minute,—objected to as calling for a conclusion.

The Court: You will have to confine your statements to the conversations between the parties.

Mr. Smith: Was anything said at that time between you and Mr. Barnard with respect to Workmen's Compensation?

A. No, not just the compensation . . . it is the general overhead.

Q. Well did you talk about compensation among other things? A. No.

Q. What did you talk about?

A. Well, just the general overhead expense, office expense and that I was to have $100.00 for the work.

Q. Did you have any conversations between you in which the term overhead was explained or defined? A. No, not that I know of.

Q. Was anything done at that time, Mr. Maehl, with respect to going ahead with the clearing or any further——

A. No, they didn't get the contract at that time—— [75]

Mr. Toole: I move that all of the testimony up to this time be stricken as immaterial, incompetent

(Testimony of Ernest Maehl.)
and as not tending to prove the making of the contract alleged in the complaint and as too remote.

Mr. Smith: I may say in that connection, your Honor, that it does because the later evidence will show that this conversation was incorporated in a later conversation.

Mr. Toole: If your Honor, please, then it couldn't have possibly been part of a later agreement.

Mr. Smith: The later agreement was oral. I think what the evidence will show is that at the time of the later agreement they referred back to the former agreement and agreed that the land should be cleared according to that agreement.

Mr. Toole: Well, it is objected to upon the ground that an agreement cannot be made to relate back to any former agreement. Motion to strike is renewed upon same ground.

The Court: Overruled upon the promise of counsel to connect the matter up later. If that connection is not made you may renew the motion.

Mr. Toole: Note the exception.

Mr. Smith: Well of course, your Honor, we can't put all of the evidence in in one sentence.

The Court: That is true. The witness has testified that because of the fact that the defendant didn't get the contract there was no contract admitted at that time.

Mr. Smith: At a later time there was an agreement made upon the terms discussed during the first talk.

(Testimony of Ernest Maehl.)

The Court: Strike the last question.

Mr. Smith: Mr. Maehl, after you talked with Mr. Jim Barnard as you have just related to us, did you at a later [76] time have a conversation with him involving the same subject matter?

A. Yes sir.

Q. And where did that conversation take place?

A. On West Fork of Rock Creek.

Q. Approximately what time?

A. About the 23rd of June or 24th,—I don't know the exact date.

Q. What year was that?

A. Nineteen hundred thirty-six.

Q. And what were you doing out on the West Fork of Rock Creek?

A. I was putting in some concrete boxes for them and some metal bases.

Q. For whom? A. Barnard-Curtiss.

Q. West Fork . . . that is not the same job as what we have called the East Fork? A. No.

Q. Will you tell the Court and the jury what the second conversation that you had with Mr. Barnard was?

A. Jim Barnard come to me and we was just getting ready to run concrete and he said I am going to make another bid on this dam and he wanted to know if I would stay with my agreements same as I made before and I told him I would and he says there is three acres of grubbing which was not listed the first time. He wanted to know if I

(Testimony of Ernest Maehl.)
could go up and look it over once more and I told him I didn't think it was necessary and rather than go up I told him I would do the three acres regardless of cost. [77]

Q. Was anything said at that time about the price that was to be paid for the clearing?

A. Yes, I said I would clear the same for $100.00 an acre.

Q. Did you at that time refer to the conversation which you had previously had with Mr. Barnard?

A. Yes sir.

Q. And what was said in that connection?

A. Wasn't anything said. I just took it that we would go ahead.

Mr. Toole: I move that the answer be stricken, —that nothing was said. I just took it that we would go ahead.

The Court: Denied. It may be important to the case.

Mr. Smith: Just tell us now if you can, what if anything was said about the conversation you had previously had.

A. Nothing more than that I would clear it at that price . . . same price as what we had talked over before.

Q. After your conversation with Mr. Barnard on that particular day what if anything did you then do?

A. Well, I stayed and run the concrete. He went down to Helena and bid on this job and he told me

(Testimony of Ernest Maehl.)

if he got the job he would call me, or his brother——

Q. Did you later see Mr. Jim Barnard or his brother? A. Saw his brother.

Q. And what did his——

Mr. Toole: That is objected to. There is no proof as *to his* brother is.

Mr. Smith: Who is the brother?

A. Bob Barnard.

Q. Do you know whether or not he is an officer of the [78] company?

A. He was superintendent on the job there where I was working.

Q. Working where?

A. On the West Fork and East Fork both.

Q. Did he give orders and that type of thing on the West Fork? A. Give me all the orders.

Q. Did he later work on the East Fork?

A. Yes sir.

Q. Did he give orders on that job?

A. Yes sir.

Q. Now, did you subsequently have a conversation with Mr. Bob Barnard about these matters?

Mr. Toole: Objected to for the reason that there is no proof that Bob Barnard had any authority to bind the corporation.

The Court: Aside from any questions involved as to whether or not he had any power to bind the corporation the witness has testified that Jim Barnard said that he would let him know. Now, if

(Testimony of Ernest Maehl.)

he did that either through Bob Barnard or through an office boy and Mr. Maehl went on the job that would certainly relate back to the contract and was just simply a method of communicating same as a letter or telegram would be. Well, of course you must prove the authority of Jim Barnard. That is a question of fact for the jury. Did he delegate his brother to act for him or speak for him. I am of the opinion that under the present condition of the record the objection is well taken and will be sustained. It should not be difficult to put the [79] officers of the defendant company on the stand.

Mr. Smith: May I withdraw this witness?

Witness Excused.

J. A. BARNARD

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Russell Smith:

Q. Your name is Jim Barnard?

A. That is right.

Q. Are you an officer of the Barnard-Curtiss Company? A. I am.

Q. And how long have you been an officer of that company? A. Ever since its existence.

Q. What office do you hold?

(Testimony of J. A. Barnard.)

A. Secretary-Treasurer.

Q. Do you have a brother named Bob Barnard?

A. Yes sir.

Q. And is Bob Barnard employed by the company? A. He is.

Q. And was he in 1936? A. He was.

Q. What capacity did he have with the company at that time? A. Superintendent.

Q. And as superintendent what were his duties with respect to the various jobs that the company had?

A. He was general superintendent directing the work.

Q. And as general superintendent did he have control of [80] the work which was being done?

A. Yes.

Q. Did he have authority from the company to enter into contracts and sub-contracts?

A. Not ordinarily.

Q. Who generally made the contracts with the sub-contractors? A. I did.

Q. You handled that yourself? A. Yes sir.

Q. Who was the president of the company?

A. M. W. Barnard.

Q. Another brother? A. My father.

Q. And did your brother Bob Barnard have any position with the company other than general superintendent? A. No sir.

Q. Did you and your brother Bob work together on these various construction jobs?

(Testimony of J. A. Barnard.)

A. I can't answer the question unless I would know——

Q. Let's be a little more specific . . . about the East Fork of Rock Creek job . . . what capacity did you act in? A. Bob was under my direction.

Q. He was under your direction? A. Yes.

Q. Did you give him any directions with respect to Mr. Maehl's work on the dam job?

Mr. Toole: That is objected to as immaterial until the contract is proven.

The Court: Overruled. [81]

Mr. Toole: Note an exception.

A. I think I did.

Q. And did you at any time advise your brother Bob to tell Mr. Maehl that you had secured a contract on that East Fork job from the State Water Board?

A. I don't know as I ever gave him that specific information.

Q. Well, did you speak with him about it at all?

A. Yes.

Q. What was the substance of that conversation?

Mr. Toole: Objected to as having no bearing upon the evidence of a contract between Barnard-Curtiss and Maehl.

The Court: It may have a bearing upon the authority to enter into it. Objection overruled.

A. I think the first direction I gave Bob on this job was to have Ernest Maehl go up on the damsite clearing and get it started quickly.

(Testimony of J. A. Barnard.)

Mr. Smith: You may be excused unless Mr. Toole——

Cross Examination

By Mr. Toole:

Q. When you referred to the damsite job what did you mean by that—what does that expression refer to?

A. Damsite clearing and grubbing was a distinctly separate part of the job . . . was bid by us separately and was a separate piece of work.

Q. And how big a clearing job was the dam?

A. It is my recollection that it was seven and some tenths acres more or less.

Q. And eventually did it turn out to be less than that?

A. It turned out to be something less. [82]

Q. And you told Bob to tell Mr. Maehl to go up and get started on the clearing on the damsite?

A. That is right. Under the provisions of our contract we had to start the dam and we wanted to get it started.

Q. And so that statement that you gave with reference to the instruction to Bob Barnard were to tell Maehl to go up and get started clearing the damsite consisting of 6.98 acres?

A. Eventually it turned out to be that, yes sir.

Mr. Toole: Well, I move that all of the testimony of this witness on direct examination be stricken in that it does not tend to prove any con-

(Testimony of J. A. Barnard.)

tract between Barnard-Curtiss Company and Maehl.

The Court: This refers to the instructions given by the witness to his brother that has not been touched on. Motion to strike denied.

Mr. Toole. With exception.

Mr. Smith: That is all, Mr. Barnard.

Witness Excused.

ERNEST MAEHL,

the plaintiff, was recalled and testified as follows:

Direct Examination
(continued)

By Mr. Russell Smith:

Q. Did you have a conversation with Bob Barnard? A. Yes to some extent.

Q. What did he tell you?

A. He told me one day that he had the contract and to go up and clear the damsite before I built the camp. [83]

Q. And after that conversation what did you do?

A. I got through with the concrete work on West Fork and went up and started clearing the reservoir site.

Mr. Toole: I move that the last part be stricken, the reservoir site, the proof being that Barnard

(Testimony of Ernest Maehl.)
told him to start on the damsite which was only 6.98 acres.

Mr. Smith: Well, your Honor, this witness has testified that he had a conversation with Mr. Jim Barnard in which it was agreed that he should clear the reservoir site for $100.00 an acre. Now then if nothing further was said about it and if he did actually clear the reservoir site for $100.00 that would amount to a contract and upon performance he would be——

The Court: Yes, upon direction of someone in authority to do it, or if the defendant saw him in the course of the work and made no objection to his doing it, and accepted it as having been done.

Mr. Smith: So that as a matter of proof we have to show what was done and who was present and that type of thing and we think what he did was material if for nothing else than to show an acceptance of the performance by the other party.

The Court: Well as I gather, the condition as related by Jim Barnard as a witness here was that he told his brother Bob to go to the clearing of the damsite and get it started quickly. Is that included in the 118 acres?

Mr. Smith: Yes, the plaintiff has testified that at the time of his conversation Mr. Jim Barnard mentioned the grubbing of the damsite and that he said he would do that free gratis, I think he said if he got the contract on the 118 acres, and at any rate

(Testimony of Ernest Maehl.)
there is no question that the damsite was a part of the construction job. [84]

The Court: Motion is denied.

Mr. Toole: Note the exception.

Q. How many men were working upon the 118 acre tract which was to be cleared?

Mr. Toole: That is objected to upon the ground that there is no contract or evidence as to its existence or proof of performance is immaterial in that no sufficient proof of the existence of the contract has yet been made as to the 118 acres.

The Court: Sustained on the theory that how many men were working is unimportant. The questions is,—was the contract made,—the price agreed upon,—the work done.

Mr. Smith: Did you employ a crew of men prior to the time that you went to the East Fork of Rock Creek?

Mr. Toole: Same objection in that there is no proof.

The Court: Well, I suppose now that counsel is proceeding upon the theory that if there be no contract made nevertheless a crew of men was employed to do the work and put upon the job and defendant accepted the benefit.

Mr. Toole: Further objection is made that the complaint in this action is based upon a contract and not upon quantum meruit.

The Court: Well, there is such a thing as an implied contract as I understand the law.

(Testimony of Ernest Maehl.)

Mr. Smith: It is our understanding, your Honor, that an acceptance——

Mr. Toole: Further objection is made that there is no sufficient evidence of competent proof of a performance.

The Court: Objection overruled.

Mr. Toole: Exception. [85]

Mr. Smith: Read the question, please.

Question read.

A. Yes sir.

Q. And what did you do with that crew of men after they were employed?

A. Well the crew we had on the concrete I took them up.

Q. And what did those men do?

A. They cleared the ground.

Q. What was the first thing that you did after you got to the scene of the operation, what was the first physical act done?

Mr. Toole: May it be understood, your Honor, that the objection to all of this evidence is made on the ground that the plaintiff has not proven a contract and that the proof of a performance is immaterial.

The Court: It may be so understood and that each and every part of the testimony now going in is subject to the objection and exception heretofore made by the attorney for the defense.

Mr. Smith: What we mean by that is what did your men first do?

A. They cleared the actual damsite.

(Testimony of Ernest Maehl.)

Q. Now then you speak of the damsite, Mr. Maehl, what do you refer to?

A. Where the dam is actually built on.

Q. Now is there any difference in the type of clearing on the place where the dam actually sets than on the reservoir site?

A. Yes, everything had to be taken off, stumps and everything so they could strip the top soil.

[86]

Q. How many acres were involved in the damsite proper, do you recall?

A. I think it was listed at seven acres at that time.

Q. Do you know how many acres were actually grubbed?

A. Six and ninety-eight hundredths, I think.

Q. After your men completed the grubbing on the damsite then what did they do?

A. They kept on clearing—going ahead on the reservoir site.

Mr. Toole: Now I want the objection made as to any testimony made as to the reservoir site, upon the ground that the plaintiff has not proven any contract with Barnard-Curtiss for clearing the reservoir site and upon the further ground that the proofs put in by Mr. Barnard were that the constructions was limited to clearing the damsite. Mr. Barnard of course——

The Court: Objection will be overruled.

Mr. Toole: Note the exception.

(Testimony of Ernest Maehl.)

The Court: As I understand it the damsite was the portion actually covered by the dam, is that right? And the reservoir site is the upstream land that was cleared and expected to be filled with water. Very well, let the record so show. Proceed.

Mr. Smith: Mr. Maehl, were the men whom you hired paid during the time that you were working on the damsite or the reservoir? A. Yes sir.

Q. How were they paid?

A. By check by Barnard-Curtiss.

Q. And what was your practice with respect to indicating [87] the amount that the men should receive in payment?

A. The Water Board had a scale they handed me to take up there so——

Q. Yes, but how did Barnard-Curtiss know how many days or hours——

A. I kept the time on them and took it to West Fork.

Q. And who was in charge of the West Fork Camp at that time? A. Bob Barnard.

Q. Do you know whether or not it was upon the basis of the time sheets handed in by you that the checks were made? A. Yes sir.

Q. Was your practice with respect to the payment of the men the same after you finished the actual damsite proper as it was after your men started on the clearing of what we decided to call the reservoir site?

Mr. Toole: Objected to as immaterial.

(Testimony of Ernest Maehl.)

The Court: Overruled.

Mr. Toole: Note an exception.

Mr. Smith: How long, Mr. Maehl, were you actually physically present at the time of the clearing of the dam and reservoir sites?

A. From the 24th day of August to the 9th day of November.

Q. And what happened on the 9th of November?

A. I got the flu and an abcess in my ear and got sick.

Q. Where did you go?

A. Murray Hospital.

Q. And how long were you in the Murray Hospital? A. Eighteen days.

Q. And what did you do with respect to the clearing crew at the time you went to the hospital?

[88]

A. I had Cleve Metcalf in charge of the crew.

Mr. Toole: Objected to as immaterial.

Mr. Smith: Well, he was in the hospital. I want to show what was done and how it was done while he was gone.

The Court: Objection overruled.

Mr. Toole: Exception.

Mr. Smith: Who is Cleve Metcalf, Mr. Maehl?

A. He had been around the job.

Q. And was he employed by you in connection with the West Fork project,—or I mean the East Fork? A. Yes, he was.

Q. And in what capacity was he employed?

(Testimony of Ernest Maehl.)

A. He came there on the 7th of October——

Mr. Toole: Now just a minute, we don't want conversations between Metcalf——

Mr. Smith: Don't tell us what Mr. Metcalf and you said but what did you do with respect to Mr. Metcalf after he got on the job?

A. Put him in charge of the clearing crew.

Q. And was he in charge of the clearing crew at the time you went to the hospital?

A. Yes sir.

Q. Was he in charge of the clearing crew while you were in the hospital? A. Yes sir.

Q. After you got out,—strike that—how much land had been cleared up until the time you went to the hospital, Mr. Maehl?

A. About 50 acres.

Q. And how much land had been cleared by the time,—by the 9th, I think you said, when Mr. Metcalf came on the job? [89]

A. Oh, maybe four—five acres outside of the actual damsite.

Q. That four—five acres would be on the reservoir site would it not? A. Yes sir.

Q. When did you return to the East Fork, Mr. Maehl?

A. I went back to work on the 28th of December.

Q. On the 28th of December? A. Yes sir.

Q. And at the time that you got back how much—— A. At that time?

Q. When you came back from the hospital?

(Testimony of Ernest Maehl.)

A. Well, I should judge about 90 acres.

Q. You would say roughly 90?

A. Between 80—90 somewhere.

Q. And when was the final clearing completed on this particular tract?

Mr. Toole: Which tract?

Mr. Smith: The 118 acre tract.

A. January 15.

Q. During all of this time while you were on the job were the time reports made to the Barnard-Curtiss Company in the same fashion?

A. Yes sir.

Q. And during your absence do you know how Barnard-Curtiss kept time on the various men working for you?

A. I think Mr. Metcalf turned the time in every night.

Q. You weren't there of course and can't testify about that? A. No.

Q. Now did you buy any tools or implements for use in [90] clearing and grubbing this land?

A. Yes, I bought them all.

Q. What kind of tools?

A. Axes, cant-hooks and some saws.

Q. Did the men employed by you use that equipment? A. Yes.

Q. Did they use it so far as you know during the whole time of the clearing? A. Yes sir.

(Testimony of Ernest Maehl.)

Q. How much did . . . you kept a time book all the time you were on the job? A. Yes sir.

Q. You have that time book with you?

A. Yes sir.

Q. Now was the time book kept from day to day? A. Yes sir.

Q. And how did you make your entries as to the amount of time each man worked?

A. Marked down every night what hours they worked certain days.

Q. And was that your uniform practice with respect to your time book? A. Yes sir.

Q. And do you have that book with you now?

A. Yes sir.

Q. Can you refer to your book, Mr. Maehl, and tell us how much time your men worked during the period that you were actually keeping the time?

A. Up as far as when I was sick?

Q. Well, the periods that you were keeping time, —I wish [91] you would tell us how much.

The Witness: (Referring to time book) Well, we started on August 24 and I kept all the time then up to October 16.

Q. And what was the total amount of time that you kept during that period of time?

A. Well, there might be some of that time that Metcalf was keeping, part of the time, and turning it in, and I don't know just what date that was when he started.

(Testimony of Ernest Maehl.)

Q. How much time does your record show was turned in on the 118 acre clearing job?

A. My total time was for 512.

Mr. Toole: I think, your Honor, he is testifying now from a memorandum which is not the time book itself.

Q. You made that computation from the time book? A. Yes sir, figured it out.

Mr. Smith: Of course I should be glad to let counsel have the time book so that he could check the computation.

Mr. Toole: Where is the time book?

The Witness: Oh, it's right here.

Mr. Smith: What was that figure you gave us, Mr. Maehl?

A. The total time amounted to $512 and some cents up to the middle of September when——

Q. $512.00? A. Yes.

Q. In making that computation would you take the hours? A. Yes sir.

Q. And you multiplied that by the rate per hour per man? A. Yes.

Q. Some of the men were employed at slightly different [92] wages than others?

A. Not at that time except myself.

Q. Included in that figure you have included the time that you yourself worked on the job?

A. Yes sir.

Q. That is from August 24 to October 16, is it, the figure you gave us? A. September.

(Testimony of Ernest Maehl.)

Q. Yes, August until September 16.

A. We started building the camp.

Q. After Mr. Metcalf came on the job who then kept the time for the clearing crew?

A. Mr. Metcalf.

Q. And was it his time book that the checks of Barnard-Curtiss were made upon?

Mr. Toole: Well, that is objected to unless he knows.

The Court: The rule, of course is, Mr. Maehl, that you can testify only to what you know, not what was told you.

A. Well, it wasn't told me but it was the system.

Q. Did you ever see him hand his time in?

A. Yes sir.

Q. And you know that the men were paid, do you not? A. Yes.

Q. Do you know whether or not Barnard-Curtiss had anybody employed by Barnard-Curtiss out keeping time?

A. They did later on,—along the latter part of September—first of October—they put a time-keeper on.

Q. And was he keeping time on this 118 acre job? A. Yes sir.

Q. But up until that time they had no one keeping the time? [93]

A. No, only myself.

Q. During the time that you were engaged in clearing the dam site and the reservoir site did any

(Testimony of Ernest Maehl.)

one else, so far as you know, furnish any materials, equipment or supplies for the work that was being done? A. Not that I know of.

Q. Did you keep the time, Mr. Maehl, from December 28 when you came back to the job until January 15 when it was completed?

A. No, Mr. Metcalf.

Q. Mr. Metcalf kept the time. At the time the 118 acres was cleared was it cleared in the ordinary and usual manner of clearing land?

A. Yes sir.

Q. Was any objection ever made to you by anyone that the dam site was not properly cleared?

Mr. Toole: That's immaterial. I move that the answer to the question just before it be stricken.

The Court: Overruled. Motion to strike denied.

Mr. Toole: Exception.

A. No sir.

Q. And was any objection ever made to you by anyone that the reservoir site was not properly cleared?

Mr. Toole: Same objection.

The Court: Overruled.

Mr. Toole: Exception.

A. No sir.

Q. Were you acquainted with the work that was being done there from the time that it started until the time the water was actually turned into the dam? [94] A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Was any work ever done in clearing or grubbing this particular 118 acres other than the work done by your men? A. No sir.

Q. You have testified, Mr. Maehl, that your men did some grubbing on the dam site, is that right?

A. Yes sir.

Q. Now in addition to the grubbing that was done on the dam site proper was any other grubbing done by your men during the course of this construction? A. Yes sir.

Q. Will you tell us what if any conversation you had with Mr. Barnard with respect to this other grubbing?

A. He come to me one morning——

Q. Now just a minute, he,—who do you mean by he?

A. Jim Barnard, and said there was some more grubbing to be done that we hadn't figured on,—that we had to grub a borrow pit.

Q. What is a borrow pit?

A. Borrow the gravel and dirt that they put in the dam.

Q. All right, go on.

A. He wanted me to go ahead and grub that too.

Mr. Toole: Just what he said.

A. He said for me to go ahead and grub the borrow pit.

Q. Was any definite figure set as to the price to be paid?

(Testimony of Ernest Maehl.)

A. I think I estimated the grubbing at $65.00 an acre.

Mr. Toole: Not responsive. I move it be stricken.

Q. Was anything said between you and Mr. Barnard at the time you were talking about the price to be paid for this [95] work?

A. Nothing more than he told me to go ahead and grub it.

Q. You have been engaged in lumbering business,—logging business for some time, have you?

A. Yes.

Q. And have you employed men to do logging and lumbering work for you? A. Yes.

Q. Are you acquainted with the reasonable value for grubbing? A. Yes sir.

Q. In your opinion, Mr. Maehl, as a man who has been engaged in logging and lumbering for many years, what would you say would be the reasonable value of clearing or grubbing per acre the acreage involved in this borrow pit?

Mr. Toole: That is objected to as not within the issues in this case. The allegation in the complaint is that the defendant and plaintiff made an agreement whereby the plaintiff agreed to grub the borrow pit amounting to 20 acres and that the defendant agreed to pay him $65.00 an acre. Therefore, certainly one of the essential elements in any contract would be consideration and there could be no

(Testimony of Ernest Maehl.)

consideration without the meeting of the minds upon the price——

The Court: The agreement was that they were to pay a reasonable price for the work done.

Mr. Toole: ——not consistent with the pleading.

The Court: Well, I think there is no material variance here. I don't suppose you are really startled or surprised at this turn.

Mr. Toole: I am always startled. Objected to upon the ground the witness has not shown himself qualified and [96] competent.

The Court: He has been grubbing all his life. Objection overruled.

Mr. Smith: Will you answer the question?

A. $65.00 an acre, I think is a very reasonable price.

Q. The land involved,—this land which you grubbed, was that a portion of the same land involved in the 118 acres? A. Yes sir.

Q. And now tell the jury, if you will, the reason or the difference between the cleared land and the grubbed land insofar as this contract is concerned?

A. Clearing land—we just cut the timber and disposed of it,—burned it,—or any way. Grubbing means we had to take the stumps out so they could use this dirt to fill in the dam,—had to take all the stumps out and burn them.

Whereupon, at 12:00 o'clock noon, the jury was admonished by the judge and court was adjourned

(Testimony of Ernest Maehl.)

until 2:00 o'clock P. M. at which time the trial was resumed.

Mr. Smith: Will you take the stand again, Mr. Maehl?

Q. Mr. Maehl, you told us this morning that you had a conversation with Mr. Jim Barnard about the grubbing on this 20 acres, you recall that, do you? A. Yes sir.

Q. When did that conversation take place?

A. Some time latter part of September.

Q. And where did the conversation take place?

A. I think we were standing on the dam site. I was there looking after the clearing crew.

Q. And at that time what was the clearing crew doing?

A. Cutting timber on the reservoir site. [97]

Q. And were they so cutting timber and so placed that Mr. Barnard could see them from the point where you were standing? A. Yes sir.

Q. Do you remember at this time whether Mr. Barnard came out to the job after that time?

A. He come out there different times. I don't know if he was out in the timber or not, he was at the camp at different times.

Q. How long would he stay?

A. Sometimes over night, sometimes a day or two.

Q. Do you recall whether Mr. Barnard was there at any time after you returned from the hospital? A. No, not Jim Barnard wasn't.

(Testimony of Ernest Maehl.)

Q. Who was there at that time?

A. A man by the name of Oscar Strickland.

Q. Did Mr. Barnard come out at all?

A. I don't think so,—not that I know of.

Q. Was Mr. Bob Barnard there at any time?

A. I think he left about two days after I come out of the hospital to come back on the job.

Q. Now, with reference again to the 20 acres that were grubbed, will you tell us how much money Barnard-Curtiss paid to you or to men engaged for hire by you on account of work done on that grubbing?

A. They just paid them the ordinary salary for the time they put in in the week, it all went in together, the grubbing and clearing.

Q. Well, what I am getting at is this, did Barnard-Curtiss pay anything to the men who were engaged in the clearing [98] or engaged in the grubbing for the work that they did in the grubbing itself? A. Not that I know of.

Q. So far as you know nothing was paid on account of that work?

A. Not on the grubbing. It was all charged to the clearing.

Q. Those two jobs were going on simultaneously. I mean by that they were going on at the same time? A. Same time.

Q. And the wages for the men who were grubbing was charged to the clearing part of the work?

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Mr. Maehl, you have been in the contracting business, have you? A. Yes sir.

Q. Have you taken and made contracts for clearing of lands, and timber contracts, road contracts and that sort of thing? A. Yes sir.

Q. State whether or not, if you know, the word "overhead" has any technical or special meaning as used by contractors engaged in various kinds of contracting in the State of Montana?

Mr. Toole: That is objected to as calling for a conclusion of the witness and upon the further ground that the witness has not shown himself to be qualified and that it invades the province of the jury.

Mr. Smith: The rule of evidence as we understand it is, your Honor, that in the interpretation of the contract [99] words are ordinarily taken in their usual and ordinary sense,—that if a word has a special or technical meaning that it is competent for anyone who knows the special meaning to tell what the word as used in that group means.

The Court: Yes, that is the rule but you are covering too much territory,—the question is the locality,—State of Montana is too broad.

Mr. Smith: Where has your contracting experience been had, Mr. Maehl?

A. Mostly timber land,—Missoula, Granite Counties, Ravalli County.

Q. Has any of it happened outside of the area of the counties you have mentioned?

(Testimony of Ernest Maehl.)

A. I didn't catch that.

Q. Have you done any contracting outside of Granite and Missoula Counties?

A. Yes, I have.

Q. Where was that?

A. Wisconsin and Michigan.

Q. Now, referring to the work that you have done in Granite County, Montana, I will ask you if the word "overhead" as used by contractors generally in Granite County, Montana, during the years 1936 and 1937 had any special meaning?

Mr. Toole: Same objection on the ground that he is not qualified,—has not shown that he has had sufficient experience to testify as to the meaning of the word.

The Court: Overruled.

Mr. Toole: Note an exception.

A. It has. [100]

Mr. Smith: And will you tell the Court and jury what that meaning is as used in the contracting business in Granite County?

Mr. Toole: Same objection.

The Court: Overruled.

Mr. Toole: Note an exception.

A. It means office expense, or putting up the payroll and all other bills, whatever price is agreed on, whatever expense is over the main contract price, the contractor carries that overhead expense, what he was supposed to clear the ground for.

(Testimony of Ernest Maehl.)

Mr. Toole: I move the whole answer be stricken as not responsive——

The Court: Overruled.

Mr. Toole: —vague and uncertain and the answer is not sufficiently definite to be of any information to the jury.

The Court: Denied.

Mr. Toole: Exception.

Mr. Smith: In the answer you say other bills and other expense, what is included, what do you mean?

Mr. Toole: Same exception.

The Court: Same ruling.

A. Well, if there is anything come up that they had to put extra men onto the payroll that would be their expense and not to me.

Mr. Toole: Move that the answer be stricken.

The Court: Denied.

Mr. Toole: Exception.

Mr. Smith: When you say take care of the payroll what [101] do you mean,—do you mean clerical expense and that sort of thing? A. Yes.

Q. When you use the term "other expense and bills" do you have in mind Workmen's Compensation?

Mr. Toole: Now, if your Honor please, the witness has been asked for his definition and given it.

The Court: I think we will let him do the testifying.

(Testimony of Ernest Maehl.)

Mr. Smith: The objection I take it is sustained.

The Court: Yes, it is. It is leading. Further, where in the pleading is there any suggestion of overhead?

Mr. Smith: There is no suggestion, your Honor. He said he had had a contract to do this work at $100.00 an acre.

The Court: Pleading, first cause of action. I haven't read the pleading with the specific purpose to find a suggestion of overhead.

Mr. Smith: There is none, your Honor.

The Court: Is it of importance here?

Mr. Smith: He testified this morning that the contract was for $100.00 an acre, the overhead to be borne by Barnard-Curtiss and I was trying to make it clear what the meaning of that term was.

The Court: Was there any objection to that part of the testimony?

Mr. Toole: Well, yes your Honor. I have definitely stated, I think, that the contract has been denied entirely. Of course the pleading in this case is that he made a special contract and it isn't based upon the quantum meruit. He cleared 118 acres,—he had been paid $100.00 an acre; therefore that he has been paid so much and that he has a balance for so much. [102] Now the defense of course is that the contract was never made and naturally any payments or payrolls which were made by Barnard-Curtiss or payments made to Mr. Maehl are material under the pleading that he has received so much

(Testimony of Ernest Maehl.)
money and to the extent that that proof goes in I think it is proper under the pleading, but a contract in which he testifies that he had a contract for $100.00 an acre and Barnard-Curtiss were to pay the overhead is a different one from that which is alleged in the complaint and to that extent it is not material.

The Court: Well, your position is clearly sound under the practice prior to the adoption of the new rules but under the new rules it is merely a question of trying to get the facts before the jury.

Mr. Toole: I agree with the Court and with counsel that it is material that this jury should know whether payments were made in the form of overhead and how they were made.

The Court: Well, there isn't any suggestion of overhead. In Paragraph IV, the first cause of action, it is alleged that plaintiff performed each and all of the terms and conditions of said agreement and the defendant promised and agreed to pay the plaintiff therefor $100.00 for each and all of the 118 acres, amounting to $11,800.00, and that said work, labor and clearing was reasonably worth said sum. You say you haven't challenged that. That the defendant has not paid the same or any part thereof except the sum of $8,360.30. I will ask counsel to furnish me sometime between now and Monday morning the testimony with reference to overhead, the objections made and the ruling there-

(Testimony of Ernest Maehl.)

on. It appears to me at the moment that it is not within the issue.

Mr. Smith: It may be, your Honor, that I have been [103] anticipating something that would probably be part of the rebuttal on our part.

The Court: That may be true, but upon the other hand the Court has ruled. If I decide from a reading of the transcript of the record that I am in error I want to be in a position to correct that error.

Mr. Toole: I think the Court should have our position clear that we have denied that any such contract was made but of course the evidence here is that payrolls have been paid and that type of payment made and if the Court concludes that a contract was made then all of those items do become of course payments upon the contract whether they are called overhead or some other form. But it is our position that plaintiff is bound by his pleadings and that his proof must conform and that counsel is required to prove that that is the contract he made and that the allegation in the complaint does not prove that in addition to the $100.00 an acre we should pay any overhead.

The Court: Under the pleading there is no mention of overhead. The pleading appears to allege a specific contract. The charge is $100.00 for clearing the 118 acres. If they were cleared under an agreement then his statement that a certain sum of money has been paid upon the contract becomes

(Testimony of Ernest Maehl.)

material. As I interpret the pleading it means that whatever was paid under the agreement to pay $100.00 an acre for clearing the 118 acres is not to be paid on overhead. However, we will proceed.

Mr. Smith: In the ordinary course of clearing land for dam site purposes, Mr. Maehl, what is done with the timber, with the trees which have been cut down? [104]

Mr. Toole: Well, the same objection, that it calls for a conclusion and it is not material.

The Court: He may show a common practice in the community which may be shown.

Mr. Toole: If your Honor please, I am anticipating that counsel now has another cause of action in the stulls in mind.

The Court: The plaintiff contends that he is to be paid a certain amount of money for doing a certain amount of work. Now counsel is proceeding upon the theory that the trees and brush were simply piled and burned. Now the third cause of action is based upon the theory that if that agreement has been made and if the defendant here requested the plaintiff to cut stulls from that timber which was on there that would be added work performed at the defendant's request and of a reasonable value of so much, so the Court will permit proof of what would be expected under a contract for cutting and grubbing.

Mr. Toole: Note the exception.

The Court: It will be noted. Proceed.

(Testimony of Ernest Maehl.)

Mr. Smith: What was the usual practice in Granite County during the years 1936 and 1937 with respect to the disposition of trees and brush during the performance of the clearing contract?

Mr. Toole: Now just a minute, this was a dam site.

The Court: Well, I don't suppose it makes much difference to us whether it was a dam site,—a mill site.

Mr. Toole: I think it does.

Mr. Smith: I will qualify the question by adding to that, on a dam site.

Mr. Toole: May I ask some questions? [105]

Mr. Smith: Yes.

Mr. Toole: Mr. Maehl, have you ever seen,—is there another dam in that county like this one?

A. No sir.

Q. Are there any in that vicinity?

A. No water conservation dams.

Q. Have you ever seen a dam in that part of the country built by the Water Conservation Board?

A. Not in Granite County.

Q. Have you seen one in any similar locality?

A. I seen one in Powell County.

Q. That the Nevada Creek dam? A. Yes.

Q. What was the timber like on that?

A. Very little clearing.

Q. Stand of timber was very light?

A. Yes.

(Testimony of Ernest Maehl.)

Mr. Toole: I object to the witness testifying as to custom.

Mr. Smith: Maybe I can go a little further. What, Mr. Maehl, is the purpose of clearing a dam site, if you know?

A. Keep the timber from getting in the irrigation canals.

Q. And in the actual construction of the earth filled dam is there any need for the saving of the timber or the valuable part of the trees?

Mr. Toole: Objected to as immaterial.

Mr. Smith: Well what I am getting at is this, the clearing of the dam site is just to get the trees out of there and getting them burned up so they are not in the dam site and the cutting and saving of the stulls is not an inci- [106] dental part of disposing of the timber.

The Court: Well, it is stated in the third cause of action that between a certain day of August, 1936, and January, 1937, and at the special instance and request of the defendant the plaintiff did cut, prepare for use and save for the defendant approximately 6000 stulls. That is the essential thing in that cause of action. It isn't a question of whether it was usual or not. The question is, did he cut,—agreement as to price,—reasonable value of the work done,—have payments been made?

Mr. Smith: I may suggest to the Court that I can't prove that by this witness.

(Testimony of Ernest Maehl.)

The Court: Well, I think it would be safe to stop examination along this line and make proof within the limits of the allegations.

Mr. Smith: Did you, Mr. Maehl, have any conversation with respect to these stulls with any of the officers of Barnard-Curtiss Company?

A. No.

Q. At the time Mr. Jim Barnard first spoke to you, you were working on the West Fork of Rock Creek? A. Yes sir.

Q. That was some kind of job entirely separate and apart from the East Fork job? A. Yes.

Q. I am now proceeding on the fourth cause of action. And where was the West Fork,—where was the job that was being done on the West Fork of Rock Creek?

A. Well, we call it Eagle Canyon. It is down by the part of Rock Creek joining the East Fork to the West Fork. [107]

Q. And how far is that from Philipsburg, Montana? A. Twenty-three miles.

Q. Twenty-three miles. What kind of work were you doing there at that time?

A. Concrete work.

Q. And were you then working under contract?

A. No.

Q. Did you have any conversation with any of the officers of the defendant company with respect to transporting men to and from work?

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. And with which officer did you have that conversation? A. Bob Barnard.

Q. What was Bob Barnard doing at the West Fork job at that time? A. Superintending it.

Q. And was he in general charge of the work?

A. Yes sir.

Q. And will you relate to us the substance of that conversation?

Mr. Toole: Well, I object to that on the ground that Bob Barnard had no right——

Mr. Smith: I believe, your Honor——

The Court: He would have the right to contract for anything necessary to carry on the work in which he was engaged. As I view the law, upon the showing that he was the general superintendent in charge of the work he could order certain things that were done to carry on the work within those limits.

A. He come in town one day and asked me to get some men [108] and put in that concrete for them and transport some men back and forth from Philipsburg.

Q. How many men did you get and transport to and from the job? A. Five.

Q. What, if anything, was said between you and Bob Barnard at the time of this conversation about payment?

A. He said he would pay me for the use of my truck and gasoline.

Q. Did he say how much he would pay you?

(Testimony of Ernest Maehl.)

A. No, he didn't.

Q. Did you, after that conversation, transport certain men to and from the West Fork job to Philipsburg? A. Yes sir.

Q. What period of time? A. Forty days.

Q. And how many men on an average would you transport each day? A. Five.

Q. What work were those men performing on the job?

A. Screening gravel and helping out in concrete.

Q. Do you have a record of the mileage that you made during the time that you were hauling these men? A. Yes sir.

Q. And how did you make up that record?

A. I figured mileage,—what it was from town out to the job and back, and the number of days that we traveled back and forth.

Q. And then did you make a charge?

A. Yes sir. [109]

Q. And how much per mile did you charge?

A. Eight cents.

Q. And is eight cents a mile a reasonable price for hauling five men? A. I think so.

Q. In the truck you were using?

A. Yes sir.

Q. How much was the total which you estimated at eight cents per mile for the work in hauling these men back and forth?

A. I don't just remember offhand unless I look in the book.

(Testimony of Ernest Maehl.)

Q. Well, will you look in your book, please? Before you do that, Mr. Maehl, this is the same book that you had this morning,—your time book, kept by yourself? A. Yes sir.

Q. When did you make your entries in the book with respect to mileage?

A. When we got through with the job.

Q. You may go ahead.

A. (Witness referring to book) I don't think I got it in this book, I think I got it in another book.

The Court: What were the miles traveled?

A. Thirteen hundred and twenty miles as near as I remember without looking it up.

The Court: You know these are things of importance and the jury must have some basis upon which they could reach a verdict. Unless it is reasonably worth eight cents a mile, they are not in a position to know.

Mr. Smith: I think perhaps I can get it in another [110] way, your Honor.

A. I remember it being 1320 miles.

Q. It was 23 miles out to this job, was it?

A. Yes sir.

Q. And of course it would be 23 miles back?

A. Yes sir.

Q. Do you remember how many days you actually spent on this concrete work?

A. Forty days.

Q. Forty work days? A. Yes sir.

Q. Did you make a trip each day?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. That would be then,—your total mileage would be 40 times 45, is that correct?

A. Yes sir.

Q. That, your Honor, adds up to more miles than he has testified to and we have asked for in the complaint and if we waive any claim that we might have to any excess over any amount actually claimed——

The Court: 1840 miles at eight cents a mile.

Mr. Smith: The complaint is based on about 1300 miles and we have asked for that amount.

Q. Do you know where this other book is?

A. I got it at home.

Q. Would that book be available by Monday morning?

The Court: You are only permitted the amount set forth in the pleading. Well, proceed.

Mr. Smith: Now, with respect to the,—was any part of the amount earned in hauling men to and from the West Fork job [111] ever paid to you?

A. No sir.

Q. Now with respect to the fifth cause of action, did you have any conversation with any of the officers of the defendant company with respect to hauling men back and forth from Philipsburg to the East Fork job? A. Yes sir.

Q. And with whom did you have that conversation? A. Jim Barnard.

(Testimony of Ernest Maehl.)

Q. And approximately when did you have that conversation?

A. At the same time that he went to Helena to bid on this job.

Q. And what was said at that time?

A. He said for me to haul the men back and forth on the job until we got the camp built.

Q. And was anything said with respect to payment? A. He said he would make it all right.

Q. He said he would make it all right. And in the building of this camp, did you have a contract to build the camp? A. No sir.

Q. How were you doing such work as you did in building the camp?

Mr. Toole: That is objected to as immaterial.

The Court: Sustained.

Q. How many men were employed in building the camp?

Mr. Toole: Same objection.

Mr. Smith: I want to show how many men he did haul back and forth. We will withdraw that question. How many men did you transport for the defendant back and forth from Philipsburg? [112]

A. Five.

Q. And did you transport them in your truck?

A. Yes sir.

Q. And how much time, or how many days were these men engaged in working on the camp?

A. I transported them for 20 days. It took longer to build the camp.

(Testimony of Ernest Maehl.)

Q. That was actual working days, was it?

A. Yes.

Q. And how far is it from the camp site to Philipsburg?

A. I think I got them two mileages mixed up I gave you. It is 23 miles to the dam.

Q. How far is it to the West Fork job?

A. Sixteen, I think.

Q. Sixteen to the West Fork and 23 to the East Fork? A. Twenty-three to the East Fork.

Q. And you hauled these men back and forth then a total of 46 miles a day for 20 days, is that correct? A. Yes sir.

Q. On what basis did you charge for your services in making this transportation?

A. Eight cents a mile.

Q. And is that a reasonable cost for operating a truck, hauling five men that distance?

Mr. Toole: Same objection.

The Court: Overruled. Well really, that is a question the jury is called upon to decide. The question as to whether eight cents a mile is reasonable on the West Fork is stricken and the jury is admonished to disregard it in determining the issues.

[113]

Mr. Smith: What kind of a truck were you operating? A. Dodge.

Q. What kind of a Dodge, how big?

A. Half ton pickup.

(Testimony of Ernest Maehl.)

Q. What is the approximate mileage that is gotten from the gasoline in a truck of that kind?

Mr. Toole: That is objected to as calling for a conclusion.

Mr. Smith: Answer that question with respect to your own truck.

A. It varies very much. We had awful bad roads out to that dam. Takes pretty near again as much.

Q. How much gasoline,—how much mileage did you get going to and from the East Fork job, if you know?

A. About 16 miles as near as I know.

Q. To the gallon. And approximately what was the price of gasoline at that time?

A. Twenty-six cents.

Q. Twenty-six cents a gallon. And what was the approximate mileage you got on the West Fork job? A. About 18.

Q. About 18 miles. And was the price of gasoline about the same?

A. About the same, varies sometimes.

Q. You were using your own truck on this work? A. Yes.

Q. Approximately how long would it take you to make a trip? A. About an hour.

Q. Would you pick up the men at their home and leave [114] them at their home?

A. Yes sir.

The Court: Was that hour the round trip or one way? A. One way.

(Testimony of Ernest Maehl.)

The Court: That is, it would take you two hours to make the round trip.

A. Two hours to make the round trip.

The Court: Proceed.

Mr. Smith: Did you,—this is with respect to the sixth cause of action,—did you perform some services, Mr. Maehl, in building camp on the job at the East Fork? A. Yes sir.

Q. At whose request did you perform those services? A. Jim Barnard's.

Q. And was anything said as to the rate at which you were to be paid? A. No, there wasn't.

Q. What is the going rate in,—what was the going rate in Granite County at that time for foreman of camp building crews?

A. $1.20 an hour.

Q. How many hours, if you know, did you work in building camp?

A. I couldn't just say without adding it up again.

Q. Have you looked at your time book?

A. Yes.

Q. Have you got it in your time book?

A. Yes.

Q. Well, will you take out your time book and tell us?

A. Total time I built my camp, 423 hours. [115]

Q. Now you have taken that figure I notice from that sheet of paper. You made that computation on

(Testimony of Ernest Maehl.)

a sheet of paper but the figures were taken out of the book.

Mr. Toole: Is that the same time book?

A. Same.

Mr. Smith: And between what dates did you work on the camp?

A. Between September 7 up till practically November 9.

Q. In what year?

A. Nineteen hundred thirty-six.

Q. How much were you paid for the work performed by you as superintendent of the camp?

A. Eighty-five cents an hour.

Q. And you have not been paid anything in excess of that? A. No.

Q. This is with respect to the seventh cause of action. When you first came to the job on the East Fork, Mr. Maehl, did you bring with you certain tools and appliances? A. Yes sir.

Q. And can you tell us generally what those tools were?

A. Axes and saws and cant-hooks and chains and wedges and different tools to use in cutting timber.

Q. Do you have any itemization as to what tools you had? A. Yes sir.

Q. Where do you have that?

A. In this book.

Q. Will you get that out and tell us just exactly what tools you took on the job?

(Testimony of Ernest Maehl.)

A. I didn't take them all at one time.

Q. Do you have a complete record there of what you did take? [116] A. Yes sir.

Q. You kept the book with respect to these tools then the same as with respect to these other items. Now, just tell us what tools you took.

A. I took six axes and a couple of saws and some wedges, three or four wedges to start with, and then kept adding to them.

Q. Do you have a record of what you added to them?

A. Yes sir. Then I kept buying axes as I went along.

Q. Did you make a record of the axes you bought? A. Yes sir.

Q. Just tell us what that was.

A. Sixteen axes to start with.

Q. Sixteen axes all told?

A. Yes, at that time.

Q. Sixteen axes to start with?

A. Not all the first day, but before we started much clearing I had sixteen axes.

Q. And did you bring any more axes?

A. Several times.

Q. How many did you bring?

A. Several times I brought four and once I brought two.

Q. Now is that all the axes you brought on the job? A. Yes.

Q. What other tools did you bring?

(Testimony of Ernest Maehl.)

The Court: Did he say brought or bought?

Mr. Smith: Now you have testified about the axes. Will you go on as quickly as you can and tell us about the other tools you took out there?

A. Two cant-hooks, two chains, two single jacks and one [117] chain wrench.

Q. All right, go ahead. Is that all?

A. That's all, I think.

Q. That is all you have a record of?

A. That is all I have a record of.

Q. What did you do with the tools you took out there?

A. Turned them over to Barnard-Curtiss.

Q. When did you do that?

A. The 15th of March.

Q. To whom did you give them?

A. Oscar Strickland.

Q. And that was the 15th of March, 1937?

A. Yes sir.

Q. And what was Oscar Strickland doing out there at that time?

A. He was superintendent there at that time.

Q. Was any other officer of the company out there other than Strickland that you know of?

A. Not at that time, I don't think.

Q. Was Strickland signing checks for the company? A. Yes sir.

Q. And at the time that you left these tools there was Barnard-Curtiss engaged in other clearing work? A. Yes sir.

(Testimony of Ernest Maehl.)

Q. And would the nature of that work require axes and saws and wedges and that type of thing?

A. It was clearing same as I was doing.

Q. What conversation did you have with Mr. Strickland with respect to these tools? Will you tell us what you and Mr. Strickland said? [118]

A. He said they would like to use the tools. He said they would finish and return them at that time. I said all right with me.

Q. Did you make any record of the tools which were left with Mr. Strickland? A. Yes sir.

Q. Do you have that record?

A. I thought I had it all in this book but I have it in the other. 29 axes, two cant-books, three saws and what few wedges and single jacks we had.

Q. Where is that other book? A. At home.

Q. Do you have any itemization any place of the reasonable value of these tools at that time?

A. Well, they were practically as good as new, in good shape.

Q. Has anything ever been paid to you on account of the value of these tools? A. No sir.

Q. Have the tools ever been returned to you?

A. No sir.

Mr. Smith: At this time I may say that I am going to, with the Court and counsel's permission, ask this witness to bring the book that has,—this itemization book. And if agreeable I would like to put him on out of order Monday to prove this particular itemization.

(Testimony of Ernest Maehl.)

The Court: Very well, you can withdraw him at this time and replace him on the stand Monday morning.

Cross Examination

By Mr. Toole: [119]

Q. Mr. Maehl, when did you take the tools that you referred to, the two saws, the six axes, the three wedges and the other items referred to in the seventh cause of action out to the project?

A. 24th day of August.

Q. Of 1936? A. 1936.

Q. And then you said, if I understood you correctly, that you turned them over to Mr. Strickland, left them there with him? A. In March.

Q. In March, 1937? A. In 1937.

Q. And where had those tools been between August 24, 1936, and March of 1937?

A. Cutting timber with them.

Q. They had been in use out on the timber project? A. Yes.

Q. So they were second hand tools?

A. Yes, they were second hand.

Q. And what other tools besides those tools did you have out there? Do you know,—can you tell me?

A. I had 16 axes that I took out there and I had axes on another job,—15.

Q. Well, in addition to the tools that you referred to here, all of the tools that you have mentioned, what else,—what tools did you have on the job out there?

(Testimony of Ernest Maehl.)

A. Nothing, only axes, cant-hooks and chains.

Q. Well, how much equipment did you have besides that which is referred to in your complaint and in your testimony? [120]

A. I didn't have any.

Q. And the tools which you referred to as having been left with Mr. Strickland consisted of all of the tools that you ever had out on the clearing or grubbing? A. Yes sir.

Q. Any horses? A. One horse.

Q. Now, as I understood you, Mr. Maehl, you said you had a conversation with Mr. Jim Barnard with respect to clearing the dam site and that conversation took place in 1935, is that right?

A. The first conversation.

Q. Where did you first meet Mr. Barnard?

A. First I ever met him I met him at Philipsburg.

Q. Was that at about that time?

A. No, several years before.

Q. You had met him previously? A. Yes.

Q. You worked for them on road work?

A. Yes.

Q. That road work was over on Rock Creek at that time? A. Yes sir.

Q. What were you doing over there,—foreman?

A. Foreman on the concrete work.

Q. And were you out on that job in 1935 when you first talked with Mr. Barnard about the clearing? A. Job wasn't going then.

(Testimony of Ernest Maehl.)

Q. When you first talked with Mr. Barnard, where was that? A. Philipsburg.

Q. In the town? [121] A. Yes.

Q. Had you previously been working on the road job? A. Not on the West Fork.

Q. Had you previously been working on any job? A. Georgetown Hill.

Q. For Barnard-Curtiss? A. Yes sir.

Q. In fact, you are a concrete foreman as well as a logger? A. Yes.

Q. Have you worked for other contractors as foreman? A. Yes sir.

Q. You worked for Barnard-Curtiss as foreman on the West Fork job?

A. Just building camp and concrete work.

Q. Out on the road? A. Yes.

Q. In Philipsburg, as I understand it, you met Mr. Barnard and discussed the dam job for the first time in 1935? A. Yes sir.

Q. What time of the year was that?

A. In the fall of the year, about this time or a little later.

Q. What was said as nearly as you can tell us?

A. He came in the shop one morning and wanted to know if I would go out and give him an estimate.

Q. Do you have a shop in Philipsburg?

A. Yes sir.

Q. Carpenter shop? A. Yes sir.

Q. Is it open now and running? [122]

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Have you been operating a carpenter shop while the dam was being built? A. Yes sir.

Q. Some men employed there?

A. Sometimes.

Q. So that while you were contracting, as you say, out on the dam job you were also running a carpenter shop in Philipsburg?

A. Not working at that time. He asked me to go out to East Fork with him. I took my truck, went out and looked the timber over.

Q. Were you on the site of the project?

A. Yes.

Q. No work was being done? A. No.

Q. Where were you standing?

A. Upper end of the project.

Q. What then was the conversation?

A. He wanted to know what I would clear it for. I told him.

Q. You said,—on your direct examination you referred to the dam site and reservoir site. The reservoir and dam were combined. And what did you say?

A. I would do the clearing for $100.00 an acre.

Q. And then what did you do, drive back to Philipsburg? A. Yes sir.

Q. As I understand, Mr. Maehl, the Montana Water Board advertised the Philipsburg dam,—the Rock Creek dam,—and Barnard-Curtiss were not low bidders? [123] A. Not the first time.

(Testimony of Ernest Maehl.)

Q. When the job was advertised by the Water Board the low bidder was another contractor?

A. Yes sir.

Q. And that low bid was made by the Inland Construction Company? A. Yes sir.

Q. After your conversation with Mr. Barnard?

A. Yes sir.

Q. So that when you first talked with Jim Barnard, Barnard-Curtiss Company didn't have any contract for the construction of the Philipsburg dam, did they? A. No sir.

Q. And then what happened? Did Inland Construction Company give up or refuse to go ahead for some reason?

A. Well, I guess it was delayed so long that——

Q. In 1936? A. In 1936.

Q. A year later, is that right?

A. About a year later.

Q. And then did you talk with Mr. Barnard again? A. Yes sir.

Q. And what was said at that time and where was it?

A. It was on the West Fork, on the concrete job we were working on.

Q. And you were out on the West Fork as a foreman? A. Yes sir.

Q. Doing the concrete work for Barnard-Curtiss on a highway job? A. Yes sir. [124]

Q. And he came out there? A. Yes sir.

Q. What did he say?

(Testimony of Ernest Maehl.)

A. He wanted to know if I would stay with that bid I made on the clearing.

Q. And what else?

A. And he said as soon as he found out he had the bid he would notify me and he wanted the dam site cleared before anything else so we cleared the dam site.

Q. I am asking you now just about the conversation that took place out on the West Fork.

A. That was all then.

Q. That was all he said?

A. If I would take my bid that I give him the time before and do that clearing and I said I would stay with my bid.

Q. And that is all that was said?

A. Just as near as I remember.

Q. Then did Mr. Barnard leave there at that time? A. Yes.

Q. And have you now told us everything that was said between you and J. A. Barnard with respect to the clearing of the reservoir and the dam site on the West Fork dam up to the time when you started to work clearing the dam site?

A. Well, he did say there was three acres of grubbing to be done on the dam site and wanted to know if I wanted to look at it and give him an estimate. It was hard to get away. I said I would rather do it for nothing so made the suggestion that I would do the three acres of grubbing without any extra charge.

(Testimony of Ernest Maehl.)

Q. Well, had anything been said in 1935 about the dam site? [125] A. No sir.

Q. And so that in 1936 when you talked about the dam site you knew that there were some six or seven acres of it, did you, in the dam site?

A. Yes, I knew there was somewhere around seven acres.

Q. And Mr. Barnard said he wanted you to do that first, is that right? A. Yes sir.

Q. And you said, well you would rather do the grubbing on the three acres for nothing than to go up and look at it?

A. Rather than lay the crew off.

Q. Was that all that was said between you and Mr. Barnard? A. As near as I remember.

Q. So he did say to you, however, that he would let you know as soon as he got the job?

A. As soon as he got the job.

Q. Bob Barnard told you that Barnard-Curtiss had the job and told you to get on the dam site and get to work? A. Yes sir.

Q. Now after you were told by Bob Barnard that they had the dam site,—that they had the contract,—you did move up there, and do you recall that Barnard-Curtiss Company——

Whereupon at 3:10 o'ulock p. m., with the usual admonition to the jury, recess was had until 3:25 o'clock p. m. when the trial was resumed.

Q. Going back to the conversation when you were out on the West Fork on the road job, don't

(Testimony of Ernest Maehl.)

you recall that Mr. J. A. Barnard, that is Jim, said to you,—asked you if you would,—if you wanted to clear the reservoir site and that you said that you would, or words to that effect, and that he then [126] said,—or words to this effect,—there is about seven or seven and a half acres in the dam site that has to be cleared and grubbed, part of it has to be grubbed, and I want you to get at that first, and that it is a separate job from the other, that is to be done first and that is a separate item in our contract and the clearing of the reservoir site can come later?

A. He said something to that effect. He wanted the dam cleared so they could start the machinery as soon as they could.

Q. And you understood that the dam site was the place where the dam was to be built and that that was a separate item of clearing and grubbing, where there was grubbing, and had to be done first.

A. There was some grubbing on the dam.

Q. And you knew that that had to be done first and in your conversation with him that was referred to separately, was it not?

A. Not that I remember.

Q. Don't you recall that Mr. Barnard referred to the dam site as having about seven acres in it?

A. Yes, something like that.

Q. He did say that? A. Yes, the dam.

Q. That had to be handled first?

A. He wanted that cleaned first.

(Testimony of Ernest Maehl.)

Q. And how long after that conversation were you engaged in the contract work out on the highway? A. Until the 23rd of August.

Q. Then did you move over to the East Fork on the dam? [127] A. Yes sir.

Q. What day did you go to work on the East Fork on the dam site?

A. The 24th day of August.

Q. You have your book there that shows that?

A. Yes sir.

Q. Will you find that in your book, please?

A. Yes sir.

Q. Do you have any other little piece of paper or memo in the book? A. Not now.

Q. There is nothing in there now that may get lost? A. No.

Q. And you have turned now to a page in your time book which,—does that show the time,—the time record of the day when you started on the dam site? A. Yes sir.

Q. I think I will have this marked, please. I notice on that page you have the names of the number of men,—are those the names of the men who went to work on the,—you tell me the date.

A. August 24.

Q. On August 24 on the dam site?

A. Yes sir.

Whereupon was received in evidence the Defendant's Exhibit 1, being page from time book, the same being identified as and marked Defendant's Exhibit 1, and being as follows:

DEFENDANT'S EXHIBIT 1 [128]

Barnard Curtis On Dam Site

TIME BOOK FOR THE MONTH AUG 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total time	Rate Pday	Amount $ Cts
H. Cunningham																								8	8	8	8		8		8	48		28.80
James Maehl																								8	8	8	8	8		8	8	48		28.80
Mont Shauder																								8	8	8	8	8			8	48		28.8–
Glen Bailey																								8	8	8	8	8			8	48	320	28.80
Ernest Maehl																								8	8	8	8	8			8	48		40.80
Ray Piper																										8	8	8	8		8	40		24.00
Frank Williams																										8	8	8	8		8	40		24.00
Sep 1936																																		204.00
H Cunningham	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		7½		36.00
James Maehl	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		9	484	43.20
Mont Shauder	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		7½		36.00
Glen Bailey	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8				8	8	8		10½		50.40
Ray Piper	8	8	8	8				8	8	8	8		8	8	8	8	8				8	8	8	8	8			8	8	8		9½		45.60
Frank Williams	8	8	8	8				8	8	8	8	8	8	8	8	8	8				8	8	8		8	8		8	8	8		7½		36.00
Ernest Maehl	8	8	8	8				8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8		9		61.20
Evens														8	6																		3	08.40
Cat														8	6							8	6		2	8							5	13.40
H Gerry																		8	8	8	8	8	8	8				8	8	8		x		25.00
H Redman																		8														x	5	58.40
B Hattis																		8	8	8	8	8	8	8			8	8	8	8		x		
E Dixon																			8	8	8	8	8	8			8	8	8	8		x		
T Hubabcka																														8		x		

[129]

(Testimony of Ernest Maehl.)

Q. Now you just take it, Mr. Maehl. That book appears to be a regular time book generally used on work of that kind? A. Yes sir.

Q. Is it the kind of a time book that you were accustomed to use on work you were on where you were keeping time as a foreman.

A. Sometimes I kept it.

Q. Isn't it a fact that the practice on all Barnard-Curtiss jobs was to have the foreman keep a record of the time? A. Yes sir.

Q. Had all of the foremen do that?

A. Yes sir.

Q. And incidentally is the time on the road job in that book, too? A. Yes sir.

Q. And your practice was to list the number of men in the column provided for that and the days of the week and the number of hours per day and at the end you would list the pay or the amount, is that so? A. Yes sir.

Q. Now is that in your handwriting?

A. Yes sir.

Q. Will you open it at that page that was introduced there, look and see if you find Ernest Maehl there, it is there is it? A. Yes sir.

Q. And is that you? A. Yes sir.

Q. In your handwriting? A. Yes sir.

Q. And you worked a certain number of days from August 24 to what? [130]

A. To the end of August.

(Testimony of Ernest Maehl.)

Q. To the end of August, and you put opposite your name $40.80. Was that right?

A. Yes sir, that's correct.

Q. So that you yourself kept the time and put down $40.80. What is that, 85 cents an hour?

A. I think so.

Q. And you put that down yourself for your own time on the dam, is that so, clearing the dam?

A. I am mistaken there. That time is for the week ending,—there is one day over,—goes on to the next week.

Q. I don't think I understand that exactly.

A. Here is five,—maybe I can explain that. There is five days the first week that we worked.

Q. Yes.

A. Which made 40 hours. But that other day in August don't go in on that week. It goes in on the next week in September. I turned the time in every Sunday to the company.

Q. Does the $40.80 represent 85 cents an hour for each hour that is shown on the time book there?

A. No, not for all the hours shown on there.

Q. Does it, what does it represent,—what is that $40.80?

A. For that first few days up to the first Saturday or Friday night,—see if I can find a piece of paper, it figures for five days.

Q. Forty hours at 85 cents an hour?

(Testimony of Ernest Maehl.)

A. Only 80 cents an hour. That was what they agreed to give me as far as the clearing was concerned. That is, carried me on the payroll at that figure.

Q. When was that agreement made? [131]

A. In the West Fork office some time.

Q. Would that have been made at the same time when Mr. Barnard was out on the West Fork?

A. No, that was after they got the contract.

Q. How long afterwards?

A. I should say along about the first of August.

Q. And when did you say the conversation was on the West Fork? A. In June some time.

Q. So that along about the first of August you had an agreement with them that they would carry you on the payroll at 80 cents an hour?

A. I thought it was 85 as near as I can remember. It is so long ago.

Q. It was 85 cents wasn't it, Mr. Maehl?

A. That is what I thought.

Q. So that when you went out on the dam to go to work you put your own name in the time book just as you did all the other men and you carried the other men at certain scales of pay lower than yourself? A. Yes sir.

Q. What were the other men getting?

A. Sixty cents.

Q. What was 60 cents?

A. Scale set by the Water Board.

(Testimony of Ernest Maehl.)

Q. Was 85 cents an hour the foreman scale?

A. Intermediate.

Q. So you carried yourself on your own time book at an intermediate labor scale while you were doing the work on the dam, did you? [132]

A. Yes sir.

Q. And at the end of each week, or two weeks, were you paid by Barnard-Curtiss?

A. Yes sir.

Q. And you were paid at 85 cents per hour?

A. Either 80 or 85.

Q. Now as a matter of fact, Mr. Maehl, didn't you get what would be called straight time? I am just asking now, if you didn't for instance work there as a foreman and get straight time which would amount to $1.19 or 20 cents an hour for 40 hours a week? A. No sir.

Q. Tell me, or do you remember,—just take your book there,—do you have some other weeks in there,—take these pages following the one on August 24.

A. September is next. September, 1936, starts right here.

Q. Did you,—there is a page here marked on dam site August, 1936, on the right hand side of the book, and on the left hand side is a page that has marked on it Defendant's Exhibit 1.

A. August is up here,—September starts down here.

(Testimony of Ernest Maehl.)

Q. I see, all right, taking both pages,—the first, or the upper half of the pages is for August and the lower half is for September. And do you find your own name carried through in September?

A. Yes sir.

Q. In the same way that all of the other men were carried through and were you paid at the rate shown and the amount shown at the edge of the book? A. Yes sir. [133]

Q. In other words, $61.20 in September?

A. Yes sir.

Q. For the number of days shown on the book?

A. Well, this don't all,—some of that goes on to the camp building,—part of the time I worked——

Q. When did you go down to work on the camp?

A. I think I got that separate,—here on a separate page,—started to work on the camp on the 11th day of September.

Q. And you went to work on the dam site on the 24th of August and then on the 11th of September you went to work at the camp. Is that right? And you continued to carry yourself on the time book at 80 or 85 cents an hour after you went down to work on the camp?

A. I didn't carry myself at all but they paid me.

Q. But you wrote that.

A. I just turned the time in to the office.

Q. Now, did you say that you were a foreman when you were working on the camp construction?

(Testimony of Ernest Maehl.)

A. I had charge of it.

Q. And when you were on the dam, however, you claim that you were a contractor. Is that right?

A. Yes sir.

Q. So you were contracting,—you were the contractor on the clearing of the dam from August 24 to September what? A. Eleventh.

Q. Eleventh, and then you went as a foreman on construction of camp from September 11th, and how long were you there?

A. Off and on until November 9. [134]

Q. And when you say, off and on, where were you when you were off?

A. Sometimes on the clearing.

Q. And when you went up to the clearing did you show you were working on the clearing?

A. Yes sir.

Q. What happened on November 9?

A. I got sick.

Q. You got sick, so that the total amount of time that you spent there was from August 24 on the dam site to September 17, is that right? On the dam site, September 11, I beg your pardon, and then from September 11 to November 9 you were building camp and off and on you were back up at the dam, is that right? A. Yes sir.

Q. During all of that time you were being paid 85 cents an hour, or 80 cents, whichever it happens to be. I don't know myself. I think it is 85. You were being paid 85 cents an hour?

(Testimony of Ernest Maehl.)

A. I think so.

Q. You were paid that and you took the money each week, a check from Barnard-Curtiss Company. Now don't you remember that on August 20 you went up there as a laborer at 60 cents an hour?

A. I don't remember.

Q. This is a paper that is marked Defendant's Exhibit 2. Does that bear your signature?

A. Yes, but I think it was changed after that.

Q. Yes? A. They made a mistake on that.

[135]

Q. That is your signature, isn't it? A. Yes.

Q. That is what is called an assignment slip of the Works Progress Administration, is that so?

A. Yes.

Q. Is that one of those slips that contractor furnishes the National Reemployment Service when a man goes to work on that job?

A. The Reemployment furnishes to the men.

Q. And that particular one marked Exhibit 2 bears your signature, as I understand you.

A. Yes sir.

Q. Now, I am handing you a paper marked Defendant's Exhibit 3 and I will ask you if that is what is called a re-classification slip by the National Reemployment Service?

A. I never saw that one before.

Q. I understand. Are you able to identify it as the kind of a slip that was used out there?

(Testimony of Ernest Maehl.)

A. I never saw one of them out there.

Mr. Toole: Then I will only offer Defendant's Exhibit 2 at this time.

Mr. Smith: No objection.

The instrument referred to was thereupon, without objection, received in evidence, identified as and marked Defendant's Exhibit 2, read to the jury, and being as follows:

DEFENDANT'S EXHIBIT 2 [136]

ASSIGNMENT SLIP—WORKS PROGRAM

Non Vet
(Not Transferable)

Employee's name Ernest Maehl
Identification No. 3120-116
Address Philipsburg, Montana.
Date August 20, 1936.
Previously assigned to works program project Yes ( ) No (x)
Certified from relief rolls ( )
Case No.
Relief district
Nonrelief person (x)
Age 58 Male (x) Female( )

The person named above is to report ready for work at 8 A. M. P. M. on Aug. 24, 1936 as a Laborer (occupation) Code at 60¢ (Rate of pay) per hour (month) on project No.....PWA 1009R.U-3 of the Barnard Curtis Co., (Operating

(Testimony of Ernest Maehl.)

agency) Req. No. 1 at Rock Creek (Location of project—city or village and county) Granite Co., to R. W. Barnard (Name of foreman or supervisor)

I Hereby Certify that I am the person named above as employee.

ERNEST MAEHL (Signature of worker)

(1
Signed Copy
to Pay Roll
Unit)

Penalties are provided for illegal signature, transfer or use of form.

Foreman or supervisor

ERNEST MAEHL
(Signature)

Assignment official

.....

(Signature) [137]

Mr. Toole. I will read that, if I may. This is called an assignment slip.

Q. So you signed that slip, Mr. Maehl, on the 20th of August to go out on the work as a laborer at 60 cents an hour? A. I did.

Q. And that was not correct, was it? That was a mistake? A. It was.

Q. Didn't you have a conversation either with Mr. Strickland or Bob Barnard about that?

(Testimony of Ernest Maehl.)

A. I had it with Bob Barnard at the time I told him that was wrong. I told him it was 85 cents.

Q. Now I am handing you Defendant's Exhibit 3 and I am asking you if that isn't the reclassification slip by which that was readjusted?

A. I never seen that before. I never got it readjusted.

Q. But you did then get the 85 cents per hour?

A. I got the 85 cents.

Q. So that from your own information the adjustment was made and you went upon the Barnard-Curtiss payroll at 85 cents an hour and that adjustment was made between the 20th of August and early in September some time?

A. I don't know just when it was made.

Q. Was it made almost immediately after you got out on the job? A. Shortly after, yes.

Q. And I want to see that time book once again just for a minute. I don't know that we marked all of the pages in here that we should have. You were out there until November 9 before you became ill?

[138]

A. Yes sir.

Q. Will you point out the pages where you kept the time until November 9? I took that clip off.

A. You maybe don't understand this here, but I marked the camp time over here, but I carried the men's time straight through here, so 7½ days

(Testimony of Ernest Maehl.)

here and the balance here, so that I wouldn't get mixed up on account of the men's time, and worked up through October and that is October yet too up to the 9th of November.

Q. And I think I would like to have all the pages between the page marked Defendant's Exhibit 1 and down to that page marked if I may. Yes, they all should go in. Now will you take this again,—I notice on the top of the page of August 24 you have the words "on dam site."

A. Yes sir.

Q. Then you kept over at the back a separate account on camp? A. Yes sir.

Q. You have any pages in there marked reservoir site?

A. That was all dam site clearing and reservoir both.

Q. You don't have any pages marked reservoir site? A. It is kind of mixed up here.

Q. Were you working for Applegate?

A. No, I had a crew.

Q. Did you have a contract over there,—where was that? A. On East Fork of Rock Creek.

Q. Could you tell us what days you were over there? A. I wasn't over there at all.

Q. Did you go over?

A. I went over to start it along about the 20th of August. [139]

Q. Who was Applegate, another contractor?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. You have no page in there marked reservoir site? A. It was all in one thing.

Q. Now I just asked you, you have no page in there marked reservoir site? A. No sir.

Q. Then you received your pay checks promptly did you at the end of each week?

A. Middle of the next week about.

Q. You would make your payroll up on a Saturday?

A. I turned the time in on Sunday, got the checks about Wednesday.

Q. You and all of the men working on the dam site were paid about Wednesday of each week for the work done the previous week? A. Yes sir.

Q. And that continued from August 24 to November 9?

A. No until they got their office built at the dam. We turned the time in every night then to the timekeeper.

Q. When were you paid?

A. About the middle of the week.

Q. From August 24 until November 9 you did receive your pay each week? A. Yes.

Q. While you were working on the dam site and while you were working on the camp. And that pay was received by you about the middle of the week for the past week? A. Yes.

Q. And you yourself were paid at the rate of 80 or 85 cents [140] an hour? A. Yes sir.

(Testimony of Ernest Maehl.)

Q. And the balance of the men at 60 cents. That right? A. Yes.

Q. Then you went to the hospital, I believe you said? A. Yes.

Q. Butte? A. Yes.

Q. How long were you there, Mr. Maehl?

A. Sixteen days, I think, I was in the hospital.

Q. When did you come back on to the work?

A. Twenty-eighth day of December.

Q. What had been done,—how much of the work had been done in clearing the dam site when you left there to go down to build the camp?

A. The dam was all clear, the damsite itself was all clear.

Q. The 6.98 acres of the dam site was all cleared. And what date was that?

A. When we finished clearing?

Q. Yes.

A. Well, we kept right on clearing until we got material to build camp.

Q. I am asking,—you were working on the dam site? A. Dam and reservoir site.

Q. You were working on clearing and grubbing and you worked from August 24 until September 11? A. Yes.

Q. Then you went down to build camp?

A. Yes. [141]

Q. How much of the dam site had been cleared and grubbed on September 11 when you went?

(Testimony of Ernest Maehl.)

A. It was all cleared.

Q. Then you stayed most of the time at the camp from September 11 until November 9?

A. Yes sir.

Q. Until you became ill? A. Yes sir.

Q. And then you came back on December 28?

A. Yes sir.

Q. How much clearing had been done?

A. Well, I should judge around about 70 acres.

Q. And that was on the dam site and most of the reservoir site, was it? A. Yes.

Q. Did you have a time book after,—when you came back?

A. I had it but I didn't keep no time then. Somebody else was keeping the time.

Q. Who was that? A. Cleve Metcalf.

Q. Did you go to work yourself?

A. No sir.

Q. Were you carried on the payrolls after you came back from the hospital? A. Yes sir.

Q. Did you go to work?

A. I went to work as a foreman, but I didn't work. I supervised the crew.

Q. Tell me a little more about what you were actually doing and where? [142]

A. Bossing the clearing crew.

Q. On the reservoir site? A. Yes.

Q. What was Metcalf doing,—was he bossing?

A. He had part of the crew.

(Testimony of Ernest Maehl.)

Q. Did you have two crews there? A. Yes.

Q. And then while you were bossing that crew were you being paid 85 cents an hour?

A. Yes sir.

Q. You accepted that pay? A. Yes sir.

Q. How long a time did that last?

A. Up until the 15th of January.

Q. And then what happened,—what happened then? A. We had the 118 acres cleared.

Q. So that you worked on the reservoir site from December 28 until January 15 at 85 cents an hour, received a check every week? A. Yes sir.

Q. You don't happen to remember whether you got another employment slip?

A. I didn't need any.

Q. And during the same time Metcalf was there, was he working on the reservoir site?

A. Yes sir.

Q. Did you and Metcalf have any disagreement of any kind? A. No sir.

Q. You didn't have a record of your time, you said you didn't. Can you tell us from memory whether you were paid [143] every work day?

A. Every day that I worked.

Q. And did you work regularly?

A. Outside of a day or two that I laid off. It was storming.

Q. In other words you put in the time same as the other men? A. Same as the other men.

(Testimony of Ernest Maehl.)

Q. After that what happened, Mr. Maehl? You said the 118 acres was cleared. Did you have any further conversation with Mr. Barnard then?

A. Yes.

Q. Did you have discussions with him with respect to a written contract?

Mr. Smith: We object to this, your Honor, as improper cross examination, outside the scope.

Q. After you finished the job on January 15 you continued up there to work, did you not?

A. Yes sir.

Q. What did you do? A. Clearing.

Q. In addition,—or outside of the 118 acres?

Mr. Smith: We object to that again as outside of the scope of cross examination.

Q. Now you said that you were paid on this 118 acres $3439.70,—now wait, I am wrong,—$8360.30. You didn't say that on your direct examination but you said that in your complaint. You have shown us a time book here that shows that you were paid some at 85 cents an hour. What were these other sums,—what was this payment of $8360.30? [144]

A. My foreman give me the time, what I had on his total time and what time I had on my book which totalled up to that.

Q. Is that strictly labor? A. Yes sir.

Q. And that is all of the labor on the job?

A. Yes sir.

Q. And that includes your own labor at 85 cents an hour? A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Are there any other items of any kind in there excepting just that one thing?

A. I don't understand what you mean.

Q. I just wanted to find out if all of that is labor.

A. Yes, as near as I could figure it out.

Q. Then you testified also that you had some tools up there, your axes and wedges, saws, chains, I think you said there were two chains. What other equipment did you use up there on the clearing, if any? A. Nothing outside of a horse.

Q. Were there any caterpillars or tractors or anything of that kind used there at all? A. No.

Q. Just one horse?

A. One horse, part time two.

Q. Then I am to understand you, Mr. Maehl, that the entire job of clearing was done with axes and saws and that all of the trees were skidded with one horse? A. Yes sir, part time we had two.

Q. And whose horse was it, by the way?

A. I ain't sure, Art Slater brought the horse up there. [145] I don't know whether it was his or not.

Q. Do you know who paid for the horse?

A. No sir.

Q. You didn't pay for it? A. Not yet.

Q. Do you know whether Barnard-Curtiss paid for it? A. I don't think so.

Q. Now I wish you would tell us as accurately as you can from any records that you have,—did

(Testimony of Ernest Maehl.)

you say that you had a book,—do you have that with you now,—would that have a list of your tools and equipment? A. Yes.

Q. Can you tell us from memory what tools and equipment you used in this clearing?

A. Well, when we got through——

Q. No, I don't mean when you got through, I mean altogether.

A. I brought about 32 axes and chains and a couple of cant-hooks.

Q. How many chains?

A. I think two that I didn't get returned. I had three chains on the job.

Q. Three chains on the job altogether. And what else? A. Wedges and single jacks.

Q. Wedges,—are they steel or iron?

A. Steel.

Q. How many of those did you have?

A. I took about a dozen out.

Q. About 12?

A. I guess I took more than that out,—I think I charged them with six when I had left,—when I got through. [146]

Q. I am not talking about tools that you charged. A. Well, that is what we used.

Q. Twelve wedges?

A. Sometimes 12 and sometimes not any, if they lost them.

Q. What ever,—some saws?

(Testimony of Ernest Maehl.)

A. Cross-cut saws.

Q. How many of those?

A. Three is the most we ever used as far as I know.

Q. And what else?

A. That is all that I know of.

Q. Did you have any cant-hooks?

A. I told you I had two cant-hooks.

Q. Oh,—and how big a crew of men?

A. All the way from 20 to 30, sometimes more or less.

Q. And Barnard-Curtiss paid all those men,—you never paid any of the men? A. No.

Q. Now you have here a claim for what you called grubbing the borrow pit. That you say was 20 acres. Where was that borrow pit located with respect to the other part of the work?

A. It was located on part of the clearing,—what we cleared.

Q. It was a part of the 118 acres?

A. Yes sir.

Q. When was the work of grubbing the borrow pit done?

A. Well, long about the middle of September we started on it.

Q. Where were you at that time?

A. I was out there in the woods. [147]

Q. Are you quite sure,—were you out there all the time? A. Not all of the time, no.

(Testimony of Ernest Maehl.)

Q. Weren't you building camp?

A. Part of the time, yes.

Q. You were on the payroll here every day weren't you during that period?

A. Not every day.

Q. Practically every day?

A. Practically every day.

Q. And the work of grubbing out this so-called 20 acres. Was that down the center of the reservoir site? Where was it located?

A. I guess it would be the east side.

Q. And who was in charge of that work?

A. I was in charge when we started and Metcalf was in charge.

Q. How much of that had been accomplished or done when you went to the hospital?

A. It was practically all done,—it was all done when I went to the hospital.

Q. During that period of time you also were carried on the Barnard-Curtiss payroll at 85 cents an hour while you were there? A. Yes sir.

Q. You said that you performed work, labor and services in getting out some stulls, when was that?

A. Latter part of December and first part of January.

Q. And your complaint says that was between the 24th day of August and the 17th day of January. Did the work of getting the stulls extend over all of that period? [148]

(Testimony of Ernest Maehl.)

A. Not over that period. It was mostly after I left there. We didn't save any stulls when I was there.

Q. So that when the stulls were gotten out you were not there? A. On the last end of it.

Q. When you say the last end,—what do you mean? A. The 118 acres.

Q. Were the stulls all gotten out while you were there? A. All but about a couple thousand.

Q. Who got the stulls out?

A. The men that I had employed there.

Q. Was Metcalf the man,——

A. He was foreman.

Q. When you came back was Metcalf still getting out stulls and he got a few out after you came back? A. Yes sir.

Q. And Barnard-Curtiss paid all the payrolls for that? A. Not for getting out the stulls.

Q. They paid all the men who worked getting out the stulls? A. Yes.

Q. You never paid anything,—not a cent as a matter of fact? A. No.

Q. That is true with respect to this grubbing too, isn't it? A. Yes sir.

Q. And was any machinery or heavy equipment used on any of that work?

A. I think we used a caterpillar about two or three shifts on it.

Q. Whose caterpillar was it?

A. Barnard and Curtiss. [149]

(Testimony of Ernest Maehl.)

Q. Who paid the driver?

A. Barnard and Curtiss.

Q. Who paid for the oil and gasoline?

A. Barnard and Curtiss.

Q. And then,—now with respect to hauling the men,—you said you had a conversation with Bob Barnard and he asked you to pick up some men in town and haul them out to the job?

A. Yes sir.

Q. At that time you were the foreman for them out there,—for Barnard and Curtiss?

A. After we started working,—concrete work.

Q. When you hauled the men out, I mean.

A. Yes sir.

Q. And you had a Dodge? A. Yes sir.

Q. And what sort of a body?

A. Little pickup body.

Q. And at Bob Barnard's request you picked up these men in the morning at Philipsburg?

A. Yes sir.

Q. And hauled them out there in the morning and back at night? A. Yes sir.

Q. You yourself were going out in your Dodge?

A. Not necessarily.

Q. Did you have any other means of going yourself? A. I would have stayed at the camp.

Q. Do I understand then that you made special trips? A. Yes sir.

Q. Did you come in especially to get these men?

[150]

(Testimony of Ernest Maehl.)

A. I live in Philipsburg, that is my home. It is 23 miles, rough roads. I wouldn't drive it——

Q. I understand you to say that Bob Barnard had asked you to pick them up? A. Yes sir.

Q. Now, I am asking you if you made special trips to haul the men? A. Not special.

Q. You came home yourself? A. Yes.

Q. And as a matter of fact you would have come home every night? A. No.

Q. Did Barnard-Curtiss have a camp out there?

A. Yes.

Q. Would the men stay in the camp?

A. Yes.

Q. Who were these men,——

A. Men that,——

Q. Friends of yours?

A. Oh, just working men.

Q. Well, name some of them.

A. Well, there was Ray Piper.

Q. Let's take Ray Piper. How long has he——

A. He didn't work on the concrete but there was men——

Q. Let's go back to Piper.

A. He wasn't on that.

Q. Was he one of the men that you hauled?

A. He wasn't hauled at no time. He camped out on the East Fork. [151]

Q. Who was one of the men that you hauled back and forth? A. My son.

(Testimony of Ernest Maehl.)

Q. Live at home with you? A. Yes sir.

Q. How old is he? A. Twenty-three.

Q. He had worked for Barnard and Curtiss out there, had he? A. I don't think so.

Q. He was working at that time? A. Yes.

Q. You took him back and forth?

A. Yes sir.

Q. Did you do that for your own convenience or for Mr. Barnard's convenience?

A. For Mr. Barnard.

Q. Now, let me ask you, Mr. Maehl, if it isn't a fact that you wanted to haul your own son back and forth and have him at home? A. No.

Q. Who else?

A. Glen Berry,—man by the name of——

Q. Let's go back to Berry. Has he been a long time in Philipsburg?

A. Not so very long.

Q. How long? Q. Two—three years.

Q. Married man? A. No.

Q. Does he live in Philipsburg?

A. In the country. [152]

Q. Didn't he ask you to?

A. No, he didn't.

Q. And who else?

A. Man named Southern or Sutton.

Q. How long has he been in Philipsburg?

A. He worked for me a month or two.

Q. He worked for you? A. Yes.

(Testimony of Ernest Maehl.)

Q. But when you started to haul him back and forth he was a man that you knew?

A. He was working for me at the time.

Q. Family man? A. I don't know.

Q. Living in Philipsburg?

A. About a month.

Q. Who else were you hauling?

A. Mr. Cunningham.

Q. Where does he live?

A. Where ever he got a job.

Q. Isn't it true, Mr. Maehl, that you were anxious and very willing to accommodate those men who wanted to come to town?

A. I just told them that they had to board in town.

Q. Is that also true of the men you hauled out to East Fork? A. Yes.

Q. Same group you,——

A. Same group, yes.

Q. And you hauled them back and forth and you did that as an accommodation or at the request of Bob Barnard? A. Yes.

Q. And you think it is worth about eight cents a mile? [153]

A. It is really worth more than that.

Q. Well, it is really worth something. As to the tools you used those tools for some months on your own work, or at least out there on the clearing work? A. Yes.

(Testimony of Ernest Maehl.)

Q. And when that was done you left them with Mr. Strickland? A. Yes sir.

Q. What did he say,—we will give you the reasonable value rather than return them, or what?

A. He said he would return them or give me the reasonable value.

Q. And you think they are worth about $92.00, you say in your complaint.

A. Something about that.

Mr. Toole: I think that's all.

The Court: Very well, call the next witness.

Mr. Smith: I think I have a little rebuttal. Just a moment, Mr. Maehl, please.

Redirect Examination

By Mr. Russell Smith:

Q. Do you know, Mr. Maehl, what, if anything, the purpose was in paying you 85 cents an hour during the hours that you worked on the job?

Mr. Toole: That is objected to. The fact speaks for itself. It would call for a conclusion.

Mr. Smith: Well, the counsel went into that matter.

The Court: Overruled.

Mr. Toole: Note the exception.

A. I don't know any more than that they had to carry me on the payroll. That's all I know about it. [154]

Q. Did you ever have any conversation with Mr. Barnard about being carried on the payroll?

(Testimony of Ernest Maehl.)

A. They said they had to carry me on the payroll.

Q. And is that all you know about that?

A. That's all I know about that.

Q. Calling your attention to Defendant's Exhibit No. 2, I will ask you if the signature in the place on the line marked foreman or supervisor is your signature? A. Yes.

Q. In other words, your signature appears on this twice, does it? A. Yes.

Q. You kept time, Mr. Maehl, from August 24 until about what date?

A. Kept time on the men that I had working under me up until the 9th of November.

Q. Until the 9th of November and up until what time did you keep time on the clearing crew?

A. Up until the 7th of October.

Q. If it had not been for hauling these men back and forth to Philipsburg where would you yourself have stayed during the time that you did haul these men?

Mr. Toole: Objected to as immaterial.

The Court: Overruled.

Q. What would you have done if you had not been hauling these men back and forth to work?

Mr. Toole: Same objection.

The Court: Overruled.

A. We would have had to put up a tent or something and batch out there. [155]

(Testimony of Ernest Maehl.)

Mr. Smith: We would like to recall this witness later.

The Court: Very well, the witness is to step aside to be recalled Monday morning at 10:00 o'clock. Call the next witness.

Witness Excused.

BERNEY HENSOLT

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Russell Smith:

Q. Will you please state your name, please.

A. Berney Hensolt.

Q. And where do you live?

A. Right at present my home is 60 miles northwest of Lewistown.

Q. Where were you employed in the years 1936, the last part of 1936 and early part of 1937?

A. Flint Creek dam.

Q. By whom?

A. Barnard-Curtiss Company.

Q. And in what capacity were you employed?

A. I was originally employed as a truck driver.

Q. How long at that?

A. Four hours. I did some engineering work.

Q. Have you had any experience in engineering. A. I have.

(Testimony of Berney Hensolt.)

Q. Have you studied? A. I have.

Q. What kind? [156]

A. Civil engineering.

Q. Where did you study that?

A. I went to college at Missoula one quarter, also studied through experience.

Q. What jobs?

A. I worked for the State Highway Department on road construction jobs, also worked for the Forest Service and the Bureau of Public Roads in Glacier Park.

Q. From the experience that you have had and from the study that you have had are you competent to measure ground? A. I think I am.

Q. Was part of your employment measuring acreage on the Flint Creek job? A. It was.

Q. Now, referring especially to the dam site and the reservoir site immediately in back of it, are you acquainted with Mr. Ernest Maehl?

A. Yes.

Q. And are you acquainted with Mr. Metcalf?

A. Yes.

Q. And did you measure the clearing done by the crew under Mr. Maehl and Mr. Metcalf?

A. Yes.

Q. And how much acreage was involved in that area? A. It was 118 acres.

Q. And did you make reports to Barnard-Curtiss of acreage from time to time? A. Yes.

(Testimony of Berney Hensolt.)

Q. And do you know what was done with those reports? [157]

A. The monthly reports that I made were turned in to the Water Board for their monthly estimates.

Mr. Smith: That is all.

Cross Examination

By Mr. Toole:

Q. You said you measured the clearing and grubbing done by the crew under the direction of Maehl and Metcalf. Did you measure the area of the dam site?

A. No. The area of the dam site I didn't measure.

Q. And do you know how much acreage was in that from any other source? A. Yes.

Q. And is the area of the dam site in the acreage that you said was 118 acres? A. Yes.

Q. But you didin't measure that?

A. Not at that time.

Q. Have you measured it since?

A. I had access to the checking of the measurements.

Q. Of the Water Board? A. Yes.

Q. The measurement in the dam site is 6.98 acres, isn't that right? A. Yes.

Q. Now, the total area out there was how much, did you measure the total area of the clearing?

(Testimony of Berney Hensolt.)

A. Not the total area. I measured the total area of the clearing and also broken down into sections of the clearing.

Q. Do you know of any section of the clearing that the Water Board refers to as 6.98 acres? Have you seen the [158] Water Board record?

A. I don't remember that particular figure.

Q. Did you take the 118 acres, any part of it, from the Water Board records?

A. Part from the Water Board records.

Q. And not taken from your own?

A. Yes.

Q. Part not taken from your own?

A. Part not taken from my own.

Q. How much?

A. Ten per cent of a 35 acre tract where there was skid timber.

Q. How much of it did you measure yourself?

A. I measured 107 acres on the dam within the reservoir itself.

Q. You measured 107 acres in the reservoir?

A. Yes.

Q. And did that include the 6.98 acres in the dam site? A. No.

Q. So that what you actually measured yourself was 107 acres? A. Yes.

Q. The other evidence that you have given, or the statement that you have given as to the balance of it, now, 11 acres, is something that you picked up, in Helena some place?

(Testimony of Berney Hensolt.)

A. There is 81/100 of an acre on the outlet conduit that I figured. I didn't measure it but I figured it in the first place from the original cross-sections of that area. [159]

Q. Let me ask you this,—there is 107 acres out there that you yourself, from your own measurement, know was cleared by the crew under the direction of Metcalf and Maehl, is that right?

A. And then there was this skid timber that they cleared, but was not within the bounds of the surveying that I had done or within the boundaries of the survey.

Q. When you got 118 acres you were relying for a portion of that on the Water Board records?

A. Yes.

Mr. Toole: Well, I move that the evidence that he measured 118 acres be striken. We deny that the 118 acres was cleared.

The Court: The testimony in regard to anything except the testimony concerning the 107 acres will be striken. Proceed.

Mr. Toole: That's all.

The Court: Any redirect?

Mr. Smith: No redirect.

Witness Excused

The Court: Call the next witness.

Mr. Smith: With the exception of the testimony to be given by Mr. Maehl when he is recalled with

respect to the tools and the value of them, the plaintiff has no further evidence at this time, your Honor. I ask that the count with respect to the stulls, that is Count number 3, I ask leave to dismiss that count.

The Court: Well, how about it. Let the record show [160] that by the agreement of the parties Count 3 is dismissed.

Whereupon at 4:40 p. m. the jury was admonished by the Court and court was adjourned until 10:00 o'clock Monday morning.

The trial of said cause was resumed at ten o'clock a. m. on Monday, October 16, 1939.

The Court: Number 1714, Ernest Maehl, plaintiff versus Barnard-Curtiss Company, a corporation, defendant. Proceed.

Mr. Russell Smith: Will you take the stand Mr. Maehl.

ERNEST MAEHL,

plaintiff, was recalled and testified as follows:

Redirect Examination

By Mr. Russell Smith:

Q. You are the same Ernest Maehl who testified here Saturday? A. Yes sir.

Mr. Toole: May I interrupt?

Mr. Smith: Yes.

(Testimony of Ernest Maehl.)

Mr. Toole: If your Honor please, we have changed court reporters, unless the Court has some objection.

The Court: The Court has no objection to either one of them; I know Mr. Catlin and he is one of the most competent court reporters in Montana, in my opinion; I have no objection to the lady but I know nothing of her qualifications. Proceed.

Mr. Toole: I might say, your Honor, that Mrs. Moody is preparing the transcript for which you asked.

The Court: Yes, I will read that this morning and have it under consideration.

Q. Saturday, Mr. Maehl, you told us you had a book in which you had some definite record of the tools and equipment taken to the Barnard-Curtiss job; did you bring that book with you this morning? [162]

A. Yes sir.

Q. Will you take it out, please. Now Mr. Maehl I will ask you if the entries in that book so far as they relate to the tools and equipment were made in your own handwriting? A. Yes sir.

Q. And when were they made?

A. On the 23 of August 1936.

Q. Is that the time to which the entries relate?

A. Yes sir.

Q. Now will you look at your book and tell the Court and jury the equipment which was taken to the Barnard-Curtiss job by you? A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Will you do that?

A. Read it off?

Q. Yes.

A. I took 16 axes, 2 canthooks, 6 wedges, 2 single jacks, 3 saw handles and 2 skidding chains.

The Court: Two what?

The Witness: Skidding chains.

The Court: Very well, go ahead.

The Witness: That's all.

The Court: Is that all?

The Witness: That's all I took at the time, yes.

Q. Now did you at any other time take any tools and equipment to the Barnard-Curtiss job?

A. I took more axes later on.

Q. You have a record of those?

A. Yes sir.

Q. Will you read that? [163]

Mr. Toole: It isn't within the issues; the only claim is 6 axes.

Mr. Smith: That's right; I wish to show that this relates to axes, your Honor, and I wish to show that other axes were taken and substituted from time to time for the originals, of the complement of axes that were taken; we are not claiming more than the 6 but they are replacements.

The Court: Well you have a right to show what was on the ground at the time he said he loaned the articles to the defendants; but I don't want to go into an accounting; in other words, how many

(Testimony of Ernest Maehl.)

he took at one time and how many he got or how many he brought out or how many were worn; what we would like to know is how many he had at the time he says he left them with Barnard-Curtiss Company, that is on the 23 day of August, 1936—paragraph 2 of your seventh cause of action.

Q. Now Mr. Maehl did you note in your book at the time the entry was made in there, the value of these articles? A. Yes sir.

Mr. Toole: Objected to as invading the province of the jury.

The Court: Well the real thing is what is the reasonable value on the market at the time and place.

Mr. Smith: Yes.

The Court: I think this is merely preliminary. Overruled.

Mr. Toole: Exception. Might I further object that the question calls for the conclusion of the witness upon the very issue which is before the jury.

The Court: Read the question. [164]

Q. (read by reporter) Now Mr. Maehl did you note in your book at the time the entry was made in there, the value of the articles?

The Court: It will be overruled.

Q. Will you go ahead now and tell us what your book shows as to the value of these articles?

The Court: Well now just a moment, that wasn't the question, the question was did he note that.

(Testimony of Ernest Maehl.)

Q. Well did you note that? A. Yes.

Q. And what is the basis of the value that you noted in the book?

Mr. Toole: Objected to for the same reason.

The Court: Overruled.

Mr. Toole: Exception.

A. That I paid for the axes?

Q. Well what is the basis upon which you get the figures you put in your book?

A. What I paid for the axes and the different tools.

Q. And now at the time that you bought will you read those figures?

Mr. Toole: This is what you paid for them Mr. Maehl?

The Witness: Yes sir.

Mr. Toole: May I ask a question?

Mr. Smith: Yes.

Q. (By Mr. Toole) Was the payment made at about the time the tools were bought or . . .

A. . . . At the time I bought them.

Q. (Mr. Toole) And were they bought some time previously and then used and then turned into Barnard-Curtiss, or were [165] they new?

A. They were new.

Mr. Toole: Oh, I see. There is no objection then.

A. 16 axes $46.00; 2 canthooks $6.00; 6 wedges $1.00; 2 single jacks $3.00; 3 saw handles $1.50; 2 chains $3.00.

(Testimony of Ernest Maehl.)

The Court: What do you mean by single jacks?

The Witness: Three-pound hammer; that is to drive wedges with.

Q. After you took these tools and equipment to the Barnard-Curtiss job were they used by you for some period of time?

A. Yes sir.

Q. And what have you to say, Mr. Maehl, as to the effect of the use which you gave these tools, upon their condition?

A. They were in good condition when I got throught with them.

Q. And what do you say about canthooks, are they subject to much wear and tear by reason of use?

Mr. Toole: If your Honor please, I may be laboring under a misapprehension, but it now appears that he was a contractor and was using these tools; they must have been his tools and he couldn't very well have left them with Barnard-Curtiss now on the clearing job referred to.

Mr. Smith: That may be true.

Mr. Toole: Well now that is all right.

Mr. Smith: Will you read the question.

Q. (read by reporter) And what do you say about canthooks, are they subject to much wear and tear by reason of use?

A. No not very much.

Q. And what about the wedges?

(Testimony of Ernest Maehl.)

A. They don't wear much. [166]

Q. What about the single jacks?

A. There was practically no wear on them.

Q. And saw handles?

A. They don't wear much.

Q. And skidding chains?

A. Very little wear on them.

Q. At what time, Mr. Maehl, did you turn these articles that you have mentioned, over to Barnard-Curtiss?

A. Around the 15th of March.

Q. And will you tell us what value these articles had then?

Mr. Toole: That is objected to as calling for a conclusion and invading the province of the jury.

The Court: While I realize that that is one of the specific questions the jury will be called on to decide—the rule is he must state the facts from which they may draw a conclusion as to what the reasonable value was and the condition of the articles at the time they were delivered, whether they had been used during the interim between August, 1936, and March, 1937, and what similar articles could be purchased for *for* cash on the date in March, in the vicinity where the delivery is claimed to have been made on the date when they left the defendant's use. Sustained.

Q. Do you know, Mr. Maehl, the price for which these various tools could be bought by a fair buyer who didn't have to buy, from a fair seller who didn't

(Testimony of Ernest Maehl.)

have to sell, on about March 15th, in the vicinity of the West Fork—or the East Fork project in Granite County?

A. The price was practically the same as when I bought them.

Q. And was the condition of the articles such that there wouldn't be any appreciable change in the price that you paid [167] for them?

A. No because I replaced anything that was worn much.

Q. Will you tell the jury Mr. Maehl what if anything transpired with respect to a pair of chain tongs?

A. I loaned them a pair of chain tongs; they said they would return them when they got through with them, but I never got them back.

Q. Now did you use the chain tongs in your own work? A. No.

Q. And about what time did you give these chain tongs to them or loan the chain tongs to them?

A. Along in September some time, 1936.

Q. And at that time what would a pair of chain tongs such as the pair you loaned them be reasonably worth in Granite County and in the neighborhood of the West Fork—or the East Fork job?

A. I paid $12.00 for them but I only charged $9.00; they had been used some.

Q. Would a pair of chain tongs of that character reasonably sell for $9.00 at that time?

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Will you tell us what happened with respect to a log chain?

A. I lent them a log chain decking line 60 feet, one time, and they used it to pull a cat out of a mud hole, or something, broke it all to pieces, said they would replace it and buy me a new one.

Q. What sized log chain was this?

A. It was a steel tape chain, 60 feet of decking, what they use for decking logs with. [168]

Q. What would a log chain of that character bring between a fair buyer and a fair seller at about the time you gave it to them or loaned it to them in Granite County in the place where you gave it to them? A. About $12.00.

Mr. Toole: How much did you say?

The Witness: About $12.00.

Q. How long a chain was that?

A. Sixty feet.

Q. Now Mr. Maehl were any of these chains or any of these tools and equipment ever returned?

A. No sir.

Q. To you? A. No sir.

Recross Examination

by Mr. Toole:

Q. Now Mr. Maehl as I understand you you left some tools with Barnard-Curtiss on the 23rd of March or thereabouts—at least made an entry in your book on the 23rd of August—said that you

(Testimony of Ernest Maehl.)

had left certain tools with them, and you put a certain value on those tools, is that right?

A. Yes sir.

Q. And where had the tools come from?

A. Out of the hardware store.

Q. But I mean when you took them down there had they been used in clearing?

A. Not at that time no.

Q. Had they ever been used on it?

A. Not these.

Q. Well did you just go to the hardware store and buy new [169] tools? A. Yes sir.

Q. And take them up to Barnard-Curtiss Company? A. Yes sir.

Q. And did you pay the hardware store or did Barnard-Curtiss pay for the tools?

A. I paid the cash for all of them that I used.

Q. Did they pay for some?

A. Later on I guess we did order some tools from Barnard and Curtiss.

Q. Isn't it a fact that Barnard and Curtiss bought the tools for all of the work that was done up there and also bought the tools that you used and that you took up also some of your own tools that became partly mixed up up there, and that when you left there you left them and that Oscar Strickland told you that you would be paid for them?

Mr. Smith: I think I will object to this question.

(Testimony of Ernest Maehl.)

The Court: I think it is a multiple question, you have included two or three questions in the one.

Q. You left them with Oscar Strickland?

A. Yes.

Q. Oscar Strickland told you that they would pay for them what the tools were worth?

A. Or return them.

Q. And that was never done? A. Yes.

Q. The tools were second hand after you had been using or they had been using them?

A. At that time they was.

Q. So that what you claim is the value of your [170] tools that were left there with Oscar Strickland? A. Yes.

Mr. Toole: Now may I ask this witness some questions I should have asked on the first cross examination, your Honor?

The Court: I will permit it.

Mr. Toole: I think I may have asked Mr. Maehl but I am not sure.

Q. Did you ever pay Mr. Metcalf, the man whom you said was your foreman, any payroll or pay him for working for you?

A. Not personally I didn't but through Barnard-Curtiss he was paid.

Q. That is, Barnard and Curtiss paid him . . .

A. . . . The same as the rest of the men.

Q. Paid him on their payroll?

A. Yes sir.

Q. Paid him with a pay check every week?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. Did you ever pay anyone employed on that job up there? A. No sir.

Q. Barnard and Curtiss paid them all, did they?

A. Yes sir.

Q. Outside of the tools you referred to did you ever furnish any equipment on the job of clearing?

A. All that I got up there.

Q. You have referred to them as the tools?

A. Yes.

Q. So that the tools you have referred to are the things you furnished on what you say was 118 acres of clearing, and that's all that you ever paid for? [171] A. Yes sir.

Q. And if any other equipment or payrolls were furnished that was paid by Barnard-Curtiss Company, is that right? A. Yes sir.

Q. You stated that you first talked to Mr. Barnard with respect to clearing up there in 1935, is that right? A. Yes sir.

Q. What time of the year was that?

A. Along about this time of year.

Q. And who was present—or where was it?

A. Up on the East Fork of Rock Creek.

Q. Did you go on to the proposed damsite and reservoir site and look at it? A. Yes sir.

Q. And did you look at the damsite?

A. Yes sir.

Q. And who was present?

(Testimony of Ernest Maehl.)

A. Myself and Jim and Bob Barnard and Cleve Metcalf.

Q. Now isn't it a fact that in your discussion with Mr. Barnard that both you and Mr. Metcalf were asked by Mr. Barnard if you would take the clearing jointly, the two of you?

A. At that time, yes,

Q. What Mr. Barnard did was to—did he get you at Philipsburg? A. Yes sir.

Q. And did he then take you and Cleve Metcalf and Bob Barnard in his car— or your car—up to the site of the dam? A. In my truck.

Q. In your truck. And Cleve Metcalf was along, is that so? [172] A. Yes.

Q. When you got up there you walked over the site of the project and looked at the clearing, did you? A. Yes sir.

Q. The four of you? A. Yes.

Q. Bob Barnard and Cleve Metcalf and you and Jim Barnard? A. Yes sir.

Q. That is Jim sitting here and Bob sitting over there in the corner—and you looked at the site of the dam, the proposed site, did you?

A. Yes sir.

Q. And then at that time Mr. Jim Barnard proposed to you and Mr. Metcalf together, that you take the clearing at $100.00 an acre, isn't that so?

A. No he didn't.

Q. Well how was it proposed?

A. He asked me what I would do the clearing for.

(Testimony of Ernest Maehl.)

Q. Well was Metcalf right there?

A. Yes.

Q. And weren't you both together?

A. Yes sir.

Q. And didn't he make the proposal for you and Metcalf to do it? A. No he asked me.

Q. Well I know he asked you but Mr. Metcalf was right there and you and Mr. Metcalf were together, weren't you? A. Yes.

Q. And it was your intention and Mr. Metcalf's to do the work together, isn't that so? [173]

A. At that time yes.

Q. And all the conversation was about you and Mr. Metcalf doing the job together?

A. Yes at that time.

Q. And even though Mr. Barnard turned to you and said "Maehl what will you do this clearing for," Mr. Metcalf was there, and you knew that he referred to you and Metcalf?

A. Well he didn't say it in them words.

Q. But you knew that was it didn't you?

A. We figured on going together if we got that contract.

Q. And the conversation in 1935, that conversation was all with respect to you and Metcalf getting together and taking the clearing together?

A. At that time yes.

Q. Then in 1936 Metcalf wasn't with you at all was he? A. No.

(Testimony of Ernest Maehl.)

Q. And you say Mr. Barnard came out on the West Fork job—that was a road job—and said "Maehl will you stand by the agreement you made last year?" I believe that's what you said?

A. Yes sir.

Q. And you said "Yes?" A. Yes.

Q. And that was all that was said?

A. That's all.

Q. Sir? A. That was all.

Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?

A. No. [174]

Q. You and Metcalf never went together to do the clearing, did you? A. No we didn't.

Q. You knew in 1936 that Mr. Barnard had a contract for the construction of the Flint Creek dam with the Montana Water Conservation Board, did you not, or was going to bid on one?

A. Was going to bid on one.

Q. And you knew that, when you talked with him, it was dependent on whether or not he got the job, as to whether you would do any of the clearing? A. Yes sir.

Q. And you knew that if he did get the job and you were to do any of the clearing that it would be necessary to conform to the requirements of the Water Board engineers? A. Yes sir.

Q. So that you intended and it was your understanding at that time that you, if you got the job,

(Testimony of Ernest Maehl.)

would do what the Water Board engineers would require in the matter of clearing and grubbing?

A. Not all the grubbing, only on the dam site.

Q. No I mean with respect to the manner and whether or not you would do it right or wrong?

A. Yes.

Q. Not as to amount, I understand that. Did you yourself ever measure any of the areas that were cleared? A. Roughly I did.

Q. Well when you say roughly you mean by that you stood out there and judged of the acreage, I take it?

A. Well I figured the amount of the area that was included [175] in a certain distance.

Q. Well I mean how did you get at that, with a tape measure or transit or did you just compute it from what your judgment was?

A. I used a tape measure.

Q. And what did you do, run the boundaries of it?

A. I just measured a certain that we cleared.

Q. But when you say you measured them were those areas square or irregular in shape?

A. Some of them was irregular and some of them fairly square.

Q. What did you do, take a tape measure and run around the outside boundaries of them?

A. Measured the length and the width and averaged it up.

(Testimony of Ernest Maehl.)

Q. You measured across this way north and south, we will say, and east and west, at three or four places? A. Yes.

Q. And averaged it up? A. Yes.

Q. And that is how you got 118 acres?

A. Yes sir.

Q. At the time that you first talked in 1935 was any mention made as to the number of acres there would be? A. Yes sir.

Q. Did Mr. Barnard say 118 acres?

A. He said there was practically 150 acres.

Q. So that the conversation with you at which Mr. Metcalf was present, in 1935, was the conversation in which Mr. Barnard referred to 150 acres?

A. Well at that time there was more than that.

Q. More than that; how much more? [176]

A. I think there was 200 and some odd acres.

Q. So that now I understand you to mean that in the conversation in 1935 Mr. Barnard proposed to you that you clear more than 200 acres?

A. Yes.

Q. And that is what you intended to do, you understood it that way?

A. According to what the acreage would be when it got measured up.

Q. And do you know what the acreage actually was?

A. Not exactly on the whole area.

Q. But it was your understanding and your agreement with Mr. Barnard, at which Mr. Metcalf

(Testimony of Ernest Maehl.)

was present and you two were together, that you would clear all of the acreage that Barnard and Curtiss had on the Flint Creek project?

A. Yes sir.

Q. And you say now that that was over 200 acres?

A. Yes sir.

Q. And what you actually did clear was 118 acres, as you say? A. Yes sir.

Q. And your figures where you averaged it then, could be somewhat in error, would you say ten percent, or something like that?

A. I don't understand.

Q. Well you heard Mr. Hensolt say he measured, I think it was, 107½ acres? A. Yes sir.

Mr. Smith: We object to that; I don't think that——

Mr. Toole: ——That is just explanatory. [177]

The Court: Yes the objection is well taken; that is for the jury as to what he testified to.

Q. Well could it have been 107½ acres instead of 118 acres, do you think?

A. At that certain area that he measured.

Q. In other words what is the accurate way of measuring acreage clearing?

A. Why generally cross section it and make a map of it and find out how many acres there is in a certain plot, with a chain, sometimes use a chain and sometimes an instrument.

Q. Did you use a chain or an instrument?

(Testimony of Ernest Maehl.)

A. I used a tape.

Q. So that when you went across the area you wouldn't know whether you were deviating a little bit from a straight line? A. Not exactly no.

Q. And if the point, you didn't go right straight across to get your base line or your computation, and you went sideways or around stumps or around a little hill or something, your line would be longer, wouldn't it, than straight across?

A. I suppose so.

Q. And if it was longer then you would have a larger acreage than you should have, isn't that so? A. Yes sir.

Q. By that way, did you keep any time after you came back in December? A. No I didn't.

Q. And as you said I think, yesterday, you kept the time until you left there on November 9th or thereabouts?

A. On the men that I had working at the camp but I didn't keep none on the clearing after the 7th of October. [178]

Q. Who kept the time after that?

A. Mr. Metcalf.

Q. Mr. Maehl there is a paper the clerk has marked as Defendant's Exhibit 10; it appears to bear your name, and the date of March 15; can you identify that as having been made in your handwriting? A. Yes sir.

Q. And is that a bill that you submitted to Barnard and Curtiss on the 15th of March, 1938?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. On the 15th of March, 1938, was the dam job all finished? A. Yes sir.

Q. Clearing had all been done and everybody had moved out by that time? A. Yes sir.

Mr. Toole: I offer that in evidence, your Honor.

Mr. Smith: We have no objection.

The Court: Very well, it will be admitted.

Thereupon was received in evidence without objection, and read to the jury, the document referred to, identified as and marked Defendant's Exhibit 10, and being as follows:

DEFENDANT'S EXHIBIT 10 [179]

Philipsburg, Montana, 3/15 1938

Barnard & Curitis

In Account With

E. MAEHL

Contractor

Date		Charges	Credits	Balance
	On West Fork Job			
(By	1320 Mile	8 Pr		105.60)
(				)
(By	10–2x12x16	320.30		9.60)
(				)
(By	60 ft Decking Line			12.00)
	Tools Furnished on Dam			69.80
	Milige 800 mi	8		64.00
	Short Pay on Camp 423 Hours	35.00		148.25
				409.25

(Testimony of Ernest Maehl.)

Q. So that you submitted that bill to Barnard-Curtiss on the 15th of March, 1938?

A. I submitted it to Bob Barnard.

Q. Yes you gave it to Bob Barnard; and that was some time after all of this work had been done that you are talking about now, the clearing?

A. Yes.

Mr. Toole: Yesterday, your Honor, this time book was put in evidence, or a part of it, but I didn't offer the pages which would be defendant's exhibits 5 to 9 inclusive; may I offer those pages now?

The Court: Any objection?

Mr. Toole: Four to Nine inclusive.

Mr. Smith: We have no objection.

The Court: They will be admitted.

Mr. Toole: May I have the Court's consent to put a red check on each corner so that it can be identified from the other pages in the book?

The Court: I think so.

Thereupon was received in evidence without objection and presented to the jury the document referred to, which includes the Defendant's Exhibits 4 to 9 inclusive, and which exhibits are severally and respectively as follows to wit:

DEFENDANT'S EXHIBIT 4 [181]

Clifton Applegate Co.

TIME BOOK FOR THE MONTH AUG 1936

5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	
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DEFENDANT'S EXHIBIT 4 [181]

Clifton Applegate Co.

TIME BOOK FOR THE MONTH AUG 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount $ Cts
dward Nev																									4	8	8	8	8					21.00
ames Huddleston																									4	8	8	8	8		8			26.40
eery Berthoud																											8	8			8			14.40
lix Berthoud																											8	8			8			14.40
E Harington																											8	8			8			14.40
lale Hale																											8	8	8		8			19.28
Sept. 1, 1936																																		100.40
dward New	8	8	8	8	8			8	8	8	8	8																						48.00
ames Hudelson	8	8	8	8				8	8	8	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				105.60
eery Berthoud	8		8	8				8	8					8	8	8	8	8			6	8	8	8		8	8	8	8					94.80
lix Berthoud	8		8	8				8	8		8	8		8	8	8	8	8			8	8	8	8		8		8	8	4				93.60
E Harington	8		8	8				8	8		8	8		8	8	8	8	8			8	8	8	8		8		8	8	4				98.40
ila Hale	8	8																																9.60
eo Munis	8	8	8	8	8			8	8	8	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				110.40
ic Munis	8	8	8	8	8			8	8	8	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				110.40
rt Schliebatis	8	8	8	8	8	8		8	8	8	8	8		8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8				168.00
ew Hemert		7	8	8				8	8	8	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				100.20
e Guiaini		7																																4.20
Page		7	8	8	8			8	8	8	8			8																				42.60
imin Oliver		7	8	8	8			8	8	8	8	8		8	8	8	8	8		8	8	8	8	8			8	8	8	8				109.80
rank Kunze			8	8	8			8	8	8	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				100.80

[182]

DEFENDANT'S EXHIBIT 5

Clifton Aplegate

TIME BOOK FOR THE MONTH SEP 190

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount $ Cts
m Reagn										6	8	8		8	8	8	8	8			8	8	8	8	8			8	8	8		26		57.60
is Lash										6	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				57.60
len McLaughin										6	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8				57.60
Maughn										6	8	8		8	8	8	8	8					8	8	8	8		8	8	8				52.80
ll Edwards											8	8		8	8		8		8	8	8	8	8	8										52.80
Leam											8	8		8																				7.20
Lambert																		8	8	8	8	8	8	8			8	8	8	8				52.80
Bradshaw																	8	8	8	8														19.20
Eckhart																	8	8	4		8	8	8	8	8			8	8	8				50.40
McClain																								8	8									9.60
Fountain																								8	8									9.60
Winghoff																								8	8									9.60
Minnis																								8	8	8		8	8	8				28.80
Rowerie																								8	8	8		8	8	8				28.80
m McCole																								8	8	8		8	8	8				28.80

[183]

DEFENDANT'S EXHIBIT 6

Barnard Comp

TIME BOOK FOR THE MONTH SEP 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount $ Cts
H Cunningham											4	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		15½		
James Maehl											4	8	8	8	8	8	8			8	8	8	4				8	8	8	8		14		
Glen Bailey											4	8	8	8	8	8				8	8	8						8	8	8		11½		
Mons Sheaden											4	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		15½		
Ray Piper											4	8	8	8	8	8	8				8	8						8	8	8		11½		
Frank Williams											4	8		8	8	8	8	8		8	8			8	8	8		8	8	8		14½		
H Garup																		8	8	8	8	8	8	8				8	8	8		10		
B Hattin																		8	8	8	8	8	8	8			8	8	8	8		11		
H Redman																		4														½		
Dixson																			8	8	8	8	8	8			8	8	8	8		10		
E Maehl											4	8	8	8	8	4	4	8	8	8	8	8	8	8	8	4	8	8	8	8		18		
T Hubacka																														8		1		

[184]

DEFENDANT'S EXHIBIT 7

Barnard Comp

TIME BOOK FOR THE MONTH OCT 16 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount $ Cts
Cunningham	8				8	8																												
Maehl	8				8	8	8	8	8			8	8	8	8	8			8	8	4													
oni Sharder	8				8	8	8																											
len Bailey	8	8			8	8	8	8	8			8	8	8	8	8			8	8	8	8	8			8		8	8	8	8			
Maehl	8	8	8		8	8	8	8	8	8		8	8	8	8	8	8		8	8	8	8	8	8		8	8			8	8	25		
y Piper	8	8			8	8	8	8	8																									
rank Williams	8	8			8	2																												
avre Gerrey	8	8			8	8																												
enry Hattis	8				8	8																												
Dixon	8				8	8																												
Hubacka	8	8	8		8	8																												
Beckman					8	8	8	8	8																									
an McKinney						8	8	8	8																									
ray Munter						8	8	8	8																									
anzel Hanifan						8	8	8																										
Twing						8	8	8				8	2																					
Walters																8	8		8	8	8	8	8			8	8	8	8	8			
Metcalf																							4											

[185]

DEFENDANT'S EXHIBIT 8

Clearing

TIME BOOK FOR THE MONTH OCT 190

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount $ Cts
Harvey Gerrey							8	8	8			8		8	8	8																		
Tim Hubaca							8	8	8			8	8	8	8	8																		
B Hattis																																		
John Roch							8	8	8	8		8	8	8	8	8																		
H. Cunningham							8	8	8			8	8	8	8	8																		
E Dixon							8	8	8			8	8	8	8	7																		
Fred Game								8	8	8			8	8	8	8																		
Tim Hanifan								8	8	8																								
Howard King								8	8	8		8	8	8	8																			
Mat Karnula									8	8		8	8	8	8	8																		
Charley Spink									8	8						½																		
H Beatman												½	8	8	8	8																		
G Aset							2	5	6	xx			8	8	8	8																Haws		
D Twing													6	8	8	8																2.	05	2½
Mat Sanders														8	8	8																		
Lawes																8																		
H Munter																8																		
Dan McKiney																8																		
																466½ Hours																		

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DEFENDANT'S EXHIBIT 9

Barnard Curtis

TIME BOOK FOR THE MONTH NOV 190

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount $ Cts
[illegible] Maehl		8		4	8	8	8		8													S												
B Walters		8		8	8	8	8																									8992		
Glen Bailey						4	8		8																									
John Muner									2																									
Mc Muner									2																	Bay Hose							83½	6.68
Geo Muner									2																		Gray						20	1.60

[187]

(Testimony of Ernest Maehl.)

A Juror: May I ask a question in connection with this bill?

The Court: What is that? May you ask a question?

The Juror: Yes.

The Court: Sure, any juror has a right to ask any question within the issues.

The Juror: This last item here—"Short Pay On Camp, 423 hours at 35 cents; that 35 cents represents the difference between 85 cents and $1.20, is that correct?

The Witness: Yes.

The Court: Any further redirect?

Mr. Smith: Yes—we have no objection. [188]

Redirect Examination

By Mr. Smith:

Q. At the time you went to the East Fork job in 1935 with Mr. Barnard—with the two Mr. Barnards and Mr. Metcalf—had the general Water Conservation Board surveyed that acreage, do you know?

A. They had made a kind of a preliminary survey of it.

Q. Was there anything definite in the amount that had to be cleared and grubbed, so far as you were aware at that time? A. No.

Q. Was the whole matter of clearing and grubbing to be determined later by the plans and specifications of the Water Board?

(Testimony of Ernest Maehl.)

Mr. Toole: Objected to as immaterial. A further objection is now made that when this case opened they asked this witness what his conversation with Mr. Barnard was, and stated that in 1935, stated that the conversation was that he had agreed with Mr. Barnard on certain things; now it develops on his cross examination the agreement was that he and Metcalf made the agreement and not this witness; the subsequent conversation of 1936 wherein it was said that he had said that he would stand by his agreement of 1935, that becomes immaterial because the agreement of 1935, by his own statement now, was made with him and Metcalf and not with him, and any conversation now becomes immaterial because the plaintiff has failed to prove his contract.

The Court: The testimony as I recall it is this: that in 1935 it was expected that the defendant here would get his contract; at that time talk was had between Jim Barnard, Maehl and Metcalf, and consideration of doing certain [189] work which was then to be done by witness and Metcalf; the witness said that was the intention in 1935, and it appears from the contract that was not done and it was not expected he would be a party to it; as I view the matter that is one for the jury to determine whether to the extent of the acreage and amount to be paid for doing the work that was done as agreed upon him in 1935, was intended to be incorporated in

(Testimony of Ernest Maehl.)

the contract of 1936, if there was such a contract; that's your position, isn't it?

Mr. Smith: That is my position.

The Court: Overruled.

Mr. Toole: Note an exception.

The Court: It will be noted.

Mr. Toole: Read the question.

Q. (read by reporter) Was the whole matter of clearing and grubbing to be determined later by the plans and specifications of the Water Board?

Mr. Toole: Now that is objected to as calling for the conclusion of the witness and not within the issues of this case and upon the further ground that the only way that plaintiff could make a contract is by stating what was said and not by stating what was to be determined.

The Court: Well you set it up in each of your counter claims that such is the fact, and I don't think it is necessary to prove it; however you opened it up in your examination, so the objection is overruled.

Mr. Toole: I would like to have it clear that plaintiff has said that, that all the agreements, the plaintiff has answered, are included in one.

The Court: Are included in the 118 acres, as I took [190] it.

Mr. Smith: Well there is another 150 acres involved in this law suit that will come in, that is not included in the 118, which has not yet been mentioned; Mr. Toole will probably introduce evidence about that. A. (No answer)

(Testimony of Ernest Maehl.)

Whereupon, with the usual admonition by the court to the jury, recess was had at 10:55 o'clock a. m. until 11:10 o'clock a. m., when the trial was resumed.

The Court: Proceed.

Q. Mr. Maehl I show you the paper marked Defendant's Exhibit 10, which is a bill presented by you to Barnard-Curtiss; will you explain to the court and jury the circumstances under which that was given, please?

A. Bob Barnard happened to come to Philipsburg to move some machinery and I asked him for a statement . . .

Mr. Toole: Now wait a minute; if it please the court we object to a statement with respect to the exhibit because the exhibit speaks for itself and is in writing.

The Court: The objection is overruled; the circumstances as to its making are clearly competent. Proceed.

Q. Will you go ahead now?

A. He said "We ain't got no final settlement yet on the clearing;" and I says "What is the matter with paying me for my tools and the other bills that you owe?" "Well," he says, "make out a separate statement of them and give it to me and I will see what can be done about it and we will pay it."

Q. Was any payment ever made?

A. No. [191]

(Testimony of Ernest Maehl.)

Q. During the course of that conversation was anything said about clearing?

A. He said at that time that he didn't have the total estimate yet, which he should have had by that time, and I guess he didn't have it, but he said he didn't have it yet.

Q. Well what do you mean by the total estimate?

A. On the clearing, what clearing we done.

Q. Well who made that estimate if you know?

A. The engineer.

Q. What engineer?

A. Water Board engineer.

Witness Excused.

Mr. Smith: The plaintiff rests, your Honor.

The Court: Open for the defendant.

Whereupon Mr. Toole made an opening statement to the jury on behalf of the defendant.

And thereupon the following evidence was introduced by defendant upon its case in chief:

J. A. BARNARD

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

By Mr. Toole:

Q. What is your name please?

(Testimony of J. A. Barnard.)

A. J. A. Barnard. [192]

Q. You were on the stand yesterday and testified that you are secretary-treasurer of Barnard-Curtiss Company? A. That's right.

Q. Who is the actual managing officer of that company—that is, do you run the company, Mr. Barnard?

A. Well I handle most of the jobs, yes sir.

Q. And the jobs of that company, the Flint Creek job in particular, was under your control and management? A. This job was yes sir.

Q. Were you there on that job all of the time?

A. No sir.

Q. What would you say as to how much of the time you spent up there, just——

A. ——Oh I would be gone at a week or two weeks intervals and back again; I kept in close touch with it.

Q. And do you recall a conversation with Mr. Maehl in 1935 with respect to the Flint Creek project? A. I do.

Q. At what time was that, about?

A. It was in the fall of 1935.

Q. And under what circumstances was that conversation had?

A. The Flint Creek project was advertised by the Montana State Water Board, bids to be taken, and we had performed some work in that vicinity, in fact we were working there on another project at the time and was on the job.

(Testimony of J. A. Barnard.)

Q. Was that other project you refer to the road job?

A. The highway job some 10 or 12 miles away.

Q. Go ahead?

A. Both Mr. Metcalf and Mr. Maehl had worked for us before in similar work, that is, clearing work, grubbing. [193]

Q. In what capacity had they worked theretofore?

A. As foremen, and they had completed—one of them had a subcontract from us one time before that.

Q. Which one of them was that?

A. Mr. Maehl.

Q. Was that contract in writing?

A. I think it was.

Q. You haven't that with you I suppose?

A. I don't have it with me, no.

Q. Proceed?

A. We therefore thought about these gentlemen with reference to doing this clearing job, and contacted them at Philipsburg and made arrangements, and I did go up to see them about the work with the view of their giving us a price on the job to do the entire clearing job and the grubbing job.

Q. Did you then go out to the job?

A. Oh yes we went all over it.

Q. Now when did you go out there, as near as you can remember?

(Testimony of J. A. Barnard.)

A. The month or day?

Q. Well just as closely as you can? Was it in the fall of 1935?

A. My recollection is that it was in the fall of 1935 and that is about as close as I can give it to you.

Q. And who went out from Philipsburg to the site of the dam?

A. Mr. Maehl and Mr. Metcalf and Robert, my brother, and myself.

Q. How did you go out? [194]

A. In Mr. Maehl's pickup car.

Q. How did you happen to pick up these two men in Philipsburg, both of them, do you know?

A. Well we contacted them, made arrangements with them, to go with us—I may not understand your question.

Q. Well did you see them yourself or did you have some one do it?

A. I don't recall, I think possibly I did.

Q. At any rate you got in Mr. Maehl's car did you? A. Yes sir.

Q. Drove out to the site of the dam?

A. Yes sir.

Q. And what did you do out there?

A. Walked over the project.

Q. Were all four of you together as you walked over the project?

A. As I remember we stayed together all the

(Testimony of J. A. Barnard.)

time; we ate dinne rout there at this ranch house together.

Q. How long a time did you spend out there?

A. Pretty much of the day.

Q. Now state what was said by you either to Mr.—well, to Mr. Maehl, with respect to the clearing and grubbing on the project?

A. As near as I can recall I merely asked them the question, after we had been over the work and they had viewed it, what their estimate of the value of the job would be or what they would do it for per acre.

Q. Now you say "they"; which one do you mean —whom do you mean?

A. My understanding was that they were going to be toge- [195] ther.

Mr. Smith: We object to what his understanding was.

Mr. Toole: That may be stricken.

The Court: It will be stricken and the jury will pay no attention to it.

Q. At the time that the conversation took place would you remember whether it was in the presence of both Mr. Maehl and Mr. Metcalf?

A. I think we were together all of the time.

Q. And to whom were your remarks directed?

A. I think Mr. Maehl.

Q. And was Mr. Metcalf there?

A. Yes.

(Testimony of J. A. Barnard.)

Q. Do you remember whether he participated in the conversation or not?

A. I couldn't say.

Q. At any rate how were Maehl and Metcalf standing, so far as you can remember, close together, or would they have been separated on the job?

A. Oh we became separated once or twice but we were together most of the time.

Q. And when the conversation took place were you together or separated?

A. We were together.

Q. And then what did Mr. Maehl say?

A. He gave me the price of $100.00 per acre.

Q. Well could you say now what were his exact words?

A. I couldn't recall the exact words.

Q. Did he say that they—or we, will do it, or words to that effect? [196]

Mr. Smith: Objected to as leading.

The Court: It is leading but the damage is done. The question is what did he say.

The Witness: What did Maehl say?

Mr. Toole: Yes.

A. My recollection is that he said we would do the clearing for $100.00 per acre.

Q. And did Mr. Metcalf as you recall say anything at that time?

A. No I don't know as he did.

(Testimony of J. A. Barnard.)

Q. Then what else if anything was said there with respect to this?

A. I don't recall anything else being said about it.

Q. Then after that what did you do?

A. Did I do?

Q. Yes what did you all four do?

A. Well we left the project and went back to Philipsburg.

Q. Drove back in Mr. Maehl's car?

A. Yes.

Q. Did you then separate from Mr. Maehl and Mr. Metcalf? A. Yes sir.

Q. And then what happened with respect to the project?

A. We placed a bid on the project and when the bids were opened at Helena the project was not awarded to anyone; it was readvertised at a little later date.

Q. Are you able to say how much clearing there was in the project as advertised at that time, the total clearing?

A. What the figure was, set up figure at that time?

Q. Yes.

A. In here I think 150 acres. [197]

Q. That was at the first time? A. Yes sir.

Q. And was any reference made to the amount of the acreage at the time you talked with Mr. Metcalf and Mr. Maehl out on the job?

(Testimony of J. A. Barnard.)

A. We understood that the——

Q. ——Don't say what you understood—if anything was said?

A. I do recall that there was some conversation about whether or not the Water Board estimate was correct or not or whether it would vary, as it often does.

Q. Did you have any record or did Maehl or Metcalf have any record present to indicate the amount of the clearing set-up at that time?

A. Do we have a record?

Q. Did you at that time, with you?

A. I think we had the notice of the hearing from the state.

Q. Do you remember either showing that to Mr. Maehl or consulting him about it?

A. No I don't know as we did, we talked about it I know, but I don't know as I showed him the notice.

Q. Well now state as nearly as you can—you don't have to give the exact conversation but as near as you can—as to what was said between you and Maehl and Metcalf, or you and Maehl, about the amount of the acreage up there at that time.

Mr. Smith: Object to this on the ground that it is repetition.

The Court: Overruled.

A. Well we assumed that the—or knew that the acreage [198] as set up, would have to be figured

(Testimony of J. A. Barnard.)

unless changed by the engineers by actual measurement.

Q. And how much was the figure as set up?

A. 150 acres, is my recollection.

Q. Well then you have already said that you all came back to Philipsburg, and you bid on the job?

A. Yes sir.

Q. And did you get the job at that time?

A. We did not.

Q. And some other contractor bid lower than you?

A. There was a lower bid than ours.

Q. And then what happened to the project?

A. I think it laid dormant for about eight months.

Q. Did the Water Conservation Board award the contract covering the project to the low bidder at that time?

A. I think they awarded it to them but that they refused to proceed.

Q. At any rate was ever any work done up there by any other contractor on a contract with the Water Board?

A. No there never was any work done.

Q. And then what happened?

A. It was readvertised.

Q. Did you bid on it a second time?

A. We did.

Q. What was the result of that?

(Testimony of J. A. Barnard.)

A. We were low bidders that second letting.

Q. Did you then or at some time about that time have a conversation with Mr. Maehl?

A. I did.

Q. Where was it? [199]

A. On the Rock Creek road job.

Q. Where was he working, if you know, at that time?

A. I couldn't state the exact position on the project but he was out there on some culvert work.

Q. And who was he working for?

A. He was working for Barnard-Curtiss Company?

Q. In what capacity? A. As a foreman.

Q. And that was on the road job over on the West Fork of Rock Creek? A. Yes.

Q. You were constructing that for the Highway Commission were you? A. Yes.

Q. What was the conversation you and Mr. Maehl had at that time, as near as you can remember?

A. I stated that the job was coming up again and wanted to know if, in case we got it, that he would be interested in some clearing work up on the project again.

Q. What did he say?

A. He said he would.

Q. What else? A. That's about all.

Q. Who else was present at that time, anyone, that you know?

(Testimony of J. A. Barnard.)

A. I don't remember that there was anyone present.

Q. Just you and Maehl?

A. There may have been but I don't recall it if there was.

Q. Did you at that time say to Mr. Maehl, did you ask him if he would stand by his contract of the previous year, or [200] words to that effect?

A. No I did not.

Q. Was anything said with respect to the contract for the previous year?

A. I don't think so.

Q. After he said that he would be interested in some clearing was anything said that you recall?

A. Not that I recall.

Q. And then what did you do?

A. Well I don't know whether I left the job that day or not, I did either within a day or two.

Q. That is did you go back to Helena in the course of the next day or so?

A. I think I did.

Q. And did you bid at the second letting?

A. Yes sir.

Q. Do you know whether that bid that you made was before or after the conversation with Mr. Maehl on the West Fork of Rock Creek?

A. My best recollection is it was before.

Mr. Smith: What was that question, the bid was made before?

(Testimony of J. A. Barnard.)

Mr. Toole: He said his recollection was the conversation was before.

The Witness: Yes.

Q. The conversation was before the bid. Then after the bid were you awarded the contract—was Barnard-Curtiss Company awarded the general contract for the construction of the dam project?

A. Yes sir. [201]

Q. And after you were awarded the contract what if anything was done with respect to Mr. Maehl?

A. Well I contacted my brother who was superintendent on the job, by either wire or mail, I forget which, and directed him to get the dam site clearing started at once, to contact Mr. Maehl and to start the job.

Q. Instructed your brother to get Mr. Maehl?

A. Yes sir.

Q. To start the job of clearing. Do you know then when you next went back to Philipsburg yourself?

A. I couldn't recall now—you mean the job, not to Philipsburg, which was out quite a ways?

Q. Yes I mean the job when I say Philipsburg? What is the next recollection you have with respect to seeing Mr. Maehl?

A. Out at the camp.

Q. And when would you say that was?

A. Oh probably two weeks after the work was started, not later than that.

(Testimony of J. A. Barnard.)

Q. Do you know what he was doing at that time?

A. I can't say, the day I came there, whether he was on the dam site or whether he was down working on the camp; my recollection is that he was working at the camp.

Q. Well with respect to the dam site clearing and grubbing on the dam site, what was the practice of the Water Board with respect to payment for the work done and time of payment and the method of determining the amount done so that payments could be made?

A. Measurements were taken once a month and an estimate prepared and we were paid I think 90 percent of it. [202]

Q. Now to refresh your recollection, Mr. Barnard, I am handing you a document marked Defendant's Exhibit 11, and I wish you would state to us whether or not that is a periodic estimate given you by the Water Board—given Barnard-Curtiss Company——

A. ——It is Estimate number 1.

Q. And when you say Estimate Number 1 is that the first estimate made? A. Yes sir.

Q. Issued by the Water Board?

A. It is.

Q. Does it have any reference to clearing?

A. None whatever—well, just a minute.

Mr. Smith: At this time we object to questioning from this memorandum on the ground that it is not

(Testimony of J. A. Barnard.)

properly qualified as a memorandum of which the witness has any knowledge.

Mr. Toole: I am about to offer it in evidence.

The Court: Overruled.

Q. Does it have any reference to clearing?

A. No.

Q. And at the time that that estimate was received had any substantial amount of work been accomplished by Barnard and Curtiss Company in the clearing? A. No sir.

Q. Or any other work—on the job?

A. No sir.

Mr. Toole: I will state to the court that I am offering it simply in this order because Estimates 1, 2, 3 and 4 will come along in their order; and I am offering [203] Exhibit 11.

Mr. Smith: I don't quite understand just what this is; may I examine the witness a minute?

Mr. Toole: Yes.

Q. (Mr. Smith) Who prepared these periodic estimates? A. We prepared them.

Q. (Mr. Smith) This estimate, Exhibit 11, is an estimate prepared by your company?

A. Yes sir.

Mr. Smith: We object, your Honor, to the Defendant's Exhibit 11, on the ground that it has not been qualified as an account book; that it is shown to be a public document, and it isn't shown to be a memorandum at all used to refresh the witness' recollection; on the ground that it is simply a self serving declaration, and not yet qualified.

(Testimony of J. A. Barnard.)

Mr. Toole: It is immaterial except that it is a part of the other estimates that will come along and will be properly qualified, and I will offer it later.

The Court: Very well.

Mr. Toole: I will offer it later.

The Court: Very well.

Mr. Smith: What is the status then, offered and withdrawn?

The Court: He has withdrawn the offer.

Mr. Toole: Yes I withdraw the offer.

Q. Now you have stated that you were the manager or the person who was in charge of this company's work; were you or are you familiar with the manner of computing the amount, of the Water Board—the manner or method used by the Water Board in computing the amount accomplished—the work [204] accomplished, on one of these contracts, and in making the payment to the contractor for such work? A. I am.

Q. And tell us how that is done? What is the document, what paper, what is the document called upon which that computation is made and the payment for the work accomplished finally made?

A. On an estimate of that nature.

Q. Is it made upon a document called a Periodical Estimate for Partial Payment?

A. That's right.

Q, And did Barnard-Curtiss Company on the Rock Creek dam job receive payments from the

(Testimony of J. A. Barnard.)

Water Conservation Board on such Periodical Estimates? A. We did.

Q. And do those estimates show, among other things, the amount of clearing and grubbing done?

A. They do.

Q. And were such estimates made and paid to you throughout the entire project?

A. They were.

Q. And who actually made the estimates?

A. The engineer on the project.

Q. And whose engineers were those?

A. The State Water Board.

Q. Did Barnard-Curtiss Company have any method of checking or watching the amount of such estimates? A. Oh yes we checked them.

Q. Did you have an engineer?

A. I don't know as we did the time the first estimates [205] were prepared; we did eventually.

Q. And do you as manager of that company or general manager know whether or not the Periodical Progress Estimates made were correct?

A. I do.

Q. And were they correct throughout the job?

A. In every respect, do you mean?

Q. With respect to the clearing and grubbing items particularly?

A. We accepted them as being correct yes.

Q. And you were paid on the basis?

A. We were paid on that basis.

Q. By the Montana Water Conservation Board?

(Testimony of J. A. Barnard.)

A. Yes sir.

Q. Now then I will take Defendant's Exhibit 11 and I will ask you if that is the original or duplicate original of the estimate made to Barnard-Curtiss Company, and by Barnard-Curtiss Company accepted as a basis for payment for the amount of work done on the project?

A. It is an exact copy of Estimate number 1.

Q. Yes it is your own, your company's record, is it? A. Yes.

Mr. Toole: I offer the exhibit.

Mr. Smith: We make the same objection, your Honor, that if this purports to be a private book of account or record of business, it has not been qualified within the rule allowing book entries to be admitted; no showing of the correctness of this document, how it was prepared, whether it is contemporaneous to the matter it purports to relate to; and if it is assumed to be a public record it [206] has not been shown to be such; it is clearly not a memorandum made by this witness, and the witness admits that he has accepted it but apparently has no knowledge of its accuracy, of his own knowledge.

Mr. Toole: Of course, your Honor, the original statement of the plaintiff was that he knew he had the work to do in conformity with the contract of the Water Board, and that he at one time discussed payments, they had not gotten their final estimates and they were delayed on that account; but I may

(Testimony of J. A. Barnard.)

state to the court that if necessary we can go into the books of account; that is the thing we sought to avoid.

The Court: Well I think counsel's objection really is based upon not laying the foundation; as I understand the rule, before a private record may be introduced in evidence it must be shown that it was kept in the ordinary course of business, that it was accurately kept, that the entries were made at or near the time of the transaction, and either by or under the supervision of the party who is testifying; is that your understanding?

Mr. Smith: That is my understanding.

Mr. Toole: May I ask the witness a few more questions?

The Court: Sure, proceed.

Q. Are these estimates, Periodical Progress Estimates—that is, how are they made up, are they made or checked in your company's offices?

A. The engineer on the project furnishes the figures but under the rules of the WPA——

Mr. Smith: Well we object to the witness testifying [207] to the rules.

Q. You are in direct supervision of the project?

A. Yes sir.

Q. And of all the persons employed?

A. Yes sir.

Q. And are you in direct supervision of the bookkeeper? A. Yes sir.

Q. Engineers who make these estimates up?

A. Yes sir.

(Testimony of J. A. Barnard.)

Q. Or who approve them for you?

A. Yes sir.

Q. And are they records which are kept in the ordinary course of business by your company?

A. Yes sir.

Q. On all of your projects? A. Yes sir.

Q. Were these particular documents so kept by you at the time of the Philipsburg or West Fork dam job? A. Yes sir.

Q. And are they documents that are made up contemporaneously with or at the time of—when the work was done? Or immediately afterwards?

A. Yes sir.

Q. Then with respect to this Exhibit 11 was this document a document which was made in the offices of Barnard-Curtiss Company under the supervision of your employees?

A. I made it myself.

Q. It is in your handwriting is it?

A. Yes sir.

Q. Well was it made at the time along about August 31st [208] or shortly thereafter?

A. Yes sir.

Q. And is it the kind of a document that is ordinarily kept in the records of Barnard-Curtiss Company? A. Yes sir.

Q. Is it the kind of a document which all contractors are required to furnish or to submit to the Water Board for payment of the quantities that are in it? A. Yes sir.

(Testimony of J. A. Barnard.)

Q. It is in regular form, is it, of that kind?

A. Yes sir.

Q. And are the entries in the document correct?

A. They are correct.

Mr. Toole: Well now I offer it.

Mr. Smith: May we examine him.

Q. (Mr. Smith) Mr. Barnard so far as your statement that the entries are correct you have no personal knowledge of that?

A. Yes I have.

Q. (Mr. Smith) Did you check the work in the field? A. I kept close watch of it.

Q. (Mr. Smith) Did you take a transit and measure it? A. No.

Q. (Mr. Smith) The figures that were placed on your books were not figures made out by your own employees were they?

A. No sir they were made by the engineers.

Q. (Mr. Smith) And the engineers were employed by the State Water Board?

A. By the State Water Board. [209]

Q. (Mr. Smith) Do you have in your bookkeeping system any other documents or records showing these figures?

A. Not that I know of.

Q. (Mr. Smith) What do you do with the figures turned over by the engineers of the state, what do you do with them?

A. These are the figures we receive for the estimate payments, right on the estimate.

(Testimony of J. A. Barnard.)

Q. (Mr. Smith) Do the engineers put the figures on the estimates?

A. They require them on this particular estimate.

Q. (Mr. Smith) Yes but I mean do they actually put the figures on the sheets?

A. No I put them on myself, they furnish us with a statement and we prepare it from their figures.

Q. (Mr. Smith) Well did you keep any of those statements? A. I don't believe we did.

Q. (Mr. Smith) The first original record that you had that ever came into your hands would be the statement? A. Yes sir.

Q. (Mr. Smith) Prepared by the engineer?

A. Yes sir they brought it out to us and we prepared this from it.

Mr. Smith: We have no objection.

The Court: It will be admitted without objection.

Mr. Toole: I think this could be submitted to the jury.

The Court: Well it can be submitted and you may refer to any part of it you think should be material now or later. [210]

Mr. Toole: I think with the court's consent I will read the part that has to do with——

The Court: The part you deem material.

Mr. Toole: Yes.

And thereupon was received in evidence without objection, and presented to the jury, the document

(Testimony of J. A. Barnard.)

referred to, the same being identified as and marked Defendant's Exhibit 11, and being as follows:

DEFENDANT'S EXHIBIT 11

P. W. Form I-23 Sheet 1 of 1 sheets.
(Revised 8-6-35)

Federal Emergency Administration of Public Works

PERIODICAL ESTIMATE FOR PARTIAL PAYMENT No. 1, DOCKET No. Mont.-100 9 R u-3

For the period Aug-1-to Aug 21, inclusive.

Type of project—irrigation.

Location Flint Creek Valley State Montana.

Borrower's name and address Montana Water Conservation Board.

Symbol No.....

Contract No. 3

Estimated cost, $264,227.75.

Contract price, $.....

Contractor's name and address:

Barnard-Curtiss Co.

Philipsburg Montana

Item No.

Units or lump sum.

Estimated Number of Units (Quantity)

Detailed estimate.

This estimate.

To date.

(Testimony of J. A. Barnard.)

Uncompleted.

Estimated physical percent completed.

Period Percent.

To date Percent.

On account of so Little work being done during this period no Request for payment is being made

Total physical percent complete. [211]

Amount

Item No.

Unit Price—$

Detailed estimate—$

This estimate—$

To date—$

Unused balance—$

Estimated monetary percent completed.

Period Percent.

To date Percent.

Totals

Total—Change orders,

Materials stored, if allowed,

Grand total,

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the

(Testimony of J. A. Barnard.)

benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both."

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements . . . or use or cause to be made or used any false . . . [212] account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement . . . relating to any matter within the jurisdiction of any governmental department or agency.

CERTIFICATION OF THE CONTRACTOR OR HIS DULY AUTHORIZED REPRESENTATIVE.

To the best of my knowledge and belief, I certify that all items, units, quantities, and prices of work and material shown on the face of Sheets Nos. of this Periodical Estimate are correct; that all work has been performed and materials supplied

(Testimony of J. A. Barnard.)

in full accordance with the terms and conditions of the corresponding construction contract documents between Montana State Water Board and Barnard-Curtiss Co., dated Aug 10 1936, approved by the State Director, and all change orders approved by the State Director; that the following is a true and correct statement of the contract account up to and including the last day of the period covered by this estimate and that no part of the "total amount payable this estimate" has been received:

(a) Total due based on the (unit price contract (lump sum contract $0

(b) Total additions beyond scope of contract 0

(c) Total earned, original contract and additions (sum of a and b) 0

(d) Total percentage retained including this estimate 0

(e) Total due on account of original contract plus additions and minus retained percentage 0

(f) Total previously received (from last estimate) 0

(g) Balance due this payment on contract and additions $0

(h) Advance on materials stored this period 0

(i) Total amount payable this estimate $0

(Testimony of J. A. Barnard.)

I further certify that all just and lawful bills against Barnard-Curtiss Co for labor, material and expendable equipment [213] employed in the performance of said contract have been paid in full in accordance with Paragraph 11, 12, P. W. A. Construction Regulations.

Contractor Barnard Curtiss Co. Place Philipsburg Montana

By J A BARNARD

Title Secty-Treasurer Date Sept 4 1946

CERTIFICATE OF THE BORROWER'S SUPERVISING ENGINEER OR ARCHITECT IN CHARGE.

I certify that I have verified this Periodical Estimate, and that to the best of my knowledge and belief it is a true and correct statement of work performed and material supplied by the contractor, and that the contractor's certified statement of his account and the amount due him is correct and just, and that all work and material included in this Periodical Estimate have been performed and supplied in full accordance with the terms and conditions of the corresponding construction contract documents and change orders approved by the State Director.

Name..... Place.....

Title..... Date.....

(Testimony of J. A. Barnard.)

CERTIFICATE OF THE PUBLIC WORKS ADMINISTRATION ENGINEER INSPECTOR IN CHARGE.

I certify that I have verified this Periodical Estimate, and that to the best of my knowledge and belief it is a true and correct statement of work performed and material supplied by the contractor, that I have in my possession satisfactory evidence of payment by the contractor of all just and lawful bills against him for labor, material, and expendable equipment [214] employed in the performance of his contract in full accordance with *Paragraph 11, 12, P. W. A. Construction Regulations, that all work and material included in this Periodical Estimate have been inspected by me or my duly authorized assistants and have been found to comply with the terms and conditions of the construction contract documents and change orders approved by the State Director.

Name..... Place.....

Title..... Date.....

*Strike out number not applicable.

REMARKS—MATERIALS STORED

Change Orders

No.
Additions—$
Deductions—$
This estimate—$
To date—$
Unused balance—$
Estimated percent completed
Period
To date
Total,
Less deduction orders,
Total—Change orders, [215]

Q. Now we have just admitted in evidence, Mr. Barnard, the progress estimate or the periodical estimate number 1, of August 31—what year?

A. 1936.

Whereupon at 12:00 o'clock noon, with the usual admonition to the jury, court was recessed until 2:00 o'clock p. m., at which time the trial was resumed.

The Court: Proceed.

Q. Mr. Barnard I will just hand you these documents, three of them all fastened together; will you state just in name what those documents are?

A. The first one is the periodical estimate from September 1 to September 30, or number 2.

(Testimony of J. A. Barnard.)

Q. What year? A. 1936.

Q. And what is the second one?

A. Number 10.

Q. Periodical estimate number 10?

A. From May 1 to 31.

Q. 1937? A. Yes.

Q. And what is the next one?

A. June 1 to 3, number 11.

Q. 1937? A. Yes.

Q. Now Mr. Barnard are one or more of those in your handwriting?

A. The first one is; number 2 is.

Q. And are the other two typewritten?

A. The other two are typewritten. [216]

Q. Were those documents prepared in your office or in the office of Barnard-Curtiss Company?

A. Yes.

Q. And were they prepared under your supervision? A. Yes.

Q. When would each document have been prepared, that is, take the first one, do you know——

A. ——After September 30, number 2 would have been.

Q. How soon after? A. A few days.

Q. Was each of them prepared within a few days after the period for which it covered?

A. It was.

Q. And was it prepared by persons under your supervision? A. Yes sir.

(Testimony of J. A. Barnard.)

Q. Do you give those estimates close supervision, the preparation of them? A. I do.

Q. And why do you do that?

A. To be sure we get paid, so as to get out money out of it, the correct amount.

Q. Then would you say the statements contained in those estimates are correct?

A. I would, substantially correct, yes.

Q. And now just refer to the first one, periodical estimate September 1 to 30, 1936; tell us how much of the clearing and grubbing had been done on the dam site at that time?

Mr. Smith: We object to each of these memorandums unless it is a memorandum to test the recollection of the [217] witness.

The Court: Yes, I think it must be shown that he refer to the memorandum to refresh his memory. is not able to testify from recollection and must

Mr. Toole: Well, I will ask that.

Q. Can you testify, Mr. Barnard, whether you refer to the memorandum or not, as to how much of the clearing was done as of the end of September 1936? Can you answer that question, can you testify, do you know, without referring to the memorandum? A. I do.

Q. Have you discovered that because you did refer to the memorandum or did you know without it?

A. No I think I had to refer to it before I knew it.

(Testimony of J. A. Barnard.)

Q. And now I will ask you, can you testify, or do you know, without referring, either now or at some previous time, to that memorandum or estimate—

A. ——I believe I would remember it, yes.

Q. Well can you testify from your own memory without referring to any memoranda, as to the amount of clearing on the dam site, clearing and grubbing done, on those dates? That is, do you know that of your own independent knowledge or do you have to refer to such estimates?

A. I have to refer to the estimates.

Q. Well then I now ask you what was the amount of clearing and grubbing done as of the 30 day of September 1936?

Mr. Smith: We again object on the ground that the memorandum isn't properly qualified as one which is to refresh his recollection, in that it is not shown that the supervision exercised by this witness over the preparation [218] of this memorandum developed any knowledge or information on his part of the items which went into the memorandum.

The Court: Objection overruled.

Q. Now just state how much clearing was done, referring to the memorandum, on September, on the dam site, on September 30, 1936?

A. 4.9 acres.

Q. Now take the next estimate, the next sheet—that is, for the period ending May 30, 1937?

A. That's right.

(Testimony of J. A. Barnard.)

Q. And how much had been done at that time?

A. 4.9 acres.

Q. Was any clearing or grubbing done on the dam site between September 30, 1936 and May 1, 1937? A. No.

Q. Then take the third memorandum and tell us whether or not any clearing and grubbing was done on the dam site in the month of June 1937?

A. There was.

Q. And was Mr. Maehl at that time on your work? A. No he wasn't.

Q. Who did that work?

A. Our own men—forces.

Q. Your own crew? A. Yes sir.

Q. Do you know when clearing and grubbing on the dam site was finished then?

A. Yes.

Q. When was it?

A. Approximately June 30. [219]

Q. 1937? A. 1937.

Q. And at that time do you know when Mr. Maehl was last on your job?

A. I know that it was in March 1937, I don't know the exact date.

Q. I take it then that the clearing and grubbing on that dam site was completed—how long after Mr. Maehl left there? A. Three months.

Q. And by whom? A. Our forces.

Q. Now Mr. Barnard do you recall that there was some grubbing done on the reservoir site?

(Testimony of J. A. Barnard.)

A. Yes.

Q. Was that in what you call a borrow pit?

A. Yes.

Q. Who did that?

A. I don't know how to answer that question; do you mean who supervised it?

Q. Well was Mr. Maehl there at any time when that was done? A. No he was not.

Q. Who did supervise it?

A. Mr. Metcalf.

Q. And who was Mr. Metcalf?

A. The foreman.

Q. Whose foreman? A. Our foreman.

Q. Do you know whether or not Mr. Maehl was ever there at any time while that work was being done? A. On the reservoir? [220]

Q. Yes the reservoir borrow pit?

A. To my knowledge he never was there on that job.

Q. But the work was done under the supervision of Mr. Metcalf? A. Yes.

Q. Do you recall when Mr. Maehl left there some time in November, when he was away?

A. Only approximately; I know it was in November, that's all I could say.

Q. Yes, you recall he did go? A. Yes.

Q. And that he was ill? A. Yes.

Q. Do you know when he came back?

A. Only from the—approximately—I know the exact date, from the testimony I have heard. You mean of my own knowledge?

(Testimony of J. A. Barnard.)

Q. Yes, from any information you have?

A. Yes he came back in December.

Mr. Smith: Well just a moment——

Q. He came back the 28 of December?

A. Yes that is correct.

Q. Did you at that time or shortly thereafter have any conversation with Mr. Maehl?

A. After he came back in December?

Q. Yes. A. I probably did.

Q. Do you remember discussing the clearing with him? A. Yes.

Q. And did you on January 18 make a written contract between Barnard-Curtiss Company and Maehl? [221] A. Yes we did.

Q. I have handed you this document—I will have it marked, please—now I am handing you Defendant's Exhibit 12 and I will ask you if that is the written contract which was made between Barnard-Curtiss Company and Ernest Maehl on January 18, 1937 in relation to clearing?

A. That's right, it is.

Mr. Toole: I offer the contract in evidence.

Q. I might have asked—this was signed by Mr. Maehl was it? A. It was.

Mr. Smith: We object to the introduction of Defendant's Exhibit 12 on the ground that it is not complete; the document by its terms makes it part of this contract, the contract of plans and specifications of the Water Conservation Board, and the document does not have appended to it that contract,

(Testimony of J. A. Barnard.)

and we therefore object to its introduction on the ground that it is only a part of the instrument.

Mr. Toole: If counsel wants to encumber the record I have the plans and specifications and contract of the Water Board; as a matter of fact that contract is admitted in the pleadings.

The Court: That is what I was going to inquire; isn't it set out in your second cross-complaint?

Mr. Toole: That's right; and admitted.

The Court: And admitted by the reply.

Mr. Smith: We admit the making of the contract, your Honor, but we admit the making of it as it was written and part of it being the Water Conservation Board contract.

The Court: Well I assume counsel's objection is well taken, providing: "it being clearly the intent and purpose [222] of this agreement that the party of the second part shall be subject to and bound by all of the provisions and conditions of the contract between the State of Montana and the party of the first part."——

Mr. Toole: Well I might, if your Honor please, withhold that; I have the other contracts here; and that contract is between Barnard and Curtiss and the Water Conservation Board, and the plans and specifications, or the specifications.

The Court: ——"and the party of the first part, which contract with proposals, plans and specifications covering said project are hereby made a binding part of this agreement." It seems to be very

(Testimony of J. A. Barnard.)

necessary to show completely what the contract was.

Mr. Toole: Yes, I will proceed with this one then, first.

Q. Mr Barnard did you at that time get a contract with the Montana Water Conservation Board for the contruction of the Flint Creek project, did you? A. We did.

Q. That contract had been signed and executed and was performed by you?

A. That's right.

Mr. Toole: May I now have this marked please.

Q. Now I am handing you the Defendant's Exhibit 13 and I will ask you if that is the original contract and all of the specifications and agreements and plans for doing the work on the Flint Creek project referred to in the contract of January 18 with Mr. Maehl?

A. As near as I can tell it is. [223]

Q. Well you know it is?

A. I know it is, yes.

Q. It bears your signature? A. Yes sir.

Q. The signatures of the members of the Montana Water Conservation Board?

A. Yes sir.

Q. And contains everything that was agreed upon before you signed it? A. It does.

Q. The method of doing the work and that sort of thing? A. That's right.

Mr. Toole: Now I offer Defendant's Exhibit 13.

Mr. Smith: We have no objection to it.

(Testimony of J. A. Barnard.)

The Court: It will be admitted without objection.

And thereupon was received in evidence without objection the document referred to, which is identified as and marked Defendant's Exhibit 13. The said exhibit is on file with the original exhibits in this case and is to be certified as an original exhibit in this record, and reference is hereby made to said exhibit.

Mr. Smith: This is in conjunction with the——

Mr. Toole: ——Well now I offer the other exhibit.

Mr. Smith: We have no objection to Exhibits 12 and 13.

The Court: It appears to me it is only encumbering the record with 12.

Mr. Toole: I'm sure about that.

The Court: It is admitted in the pleadings.

Mr. Toole: That's right, it is admitted in the pleadings; I didn't want to put it in but counsel wanted that it [224] should go in. Now is that admitted, Exhibit 12?

The Court: It was admitted without objection, as I understood it, 12 and 13.

Thereupon without objection was received in evidence the document referred to, which has been identified as and marked Defendant's Exhibit 12, and which is as follows:

[Clerk's Note: Defendant's Exhibit 12, Clearing Contract, is already set forth as Exhibit "A" to the

(Testimony of J. A. Barnard.)

Answer at page 30 of this printed record and is here omitted to avoid duplication.] [225]

And the Defendant's Exhibit 12 was thereupon read to the jury by counsel.

Q. This contract refers to 50 acres of clearing and grubbing—does it say grubbing, or is that clearing? A. Clearing only.

Q. That contract refers to 50 acres of clearing; now state whether or not the 50 acres of clearing referred to in that contract was any part of the clearing referred to as the 118 acres in these proceedings?

A. Well I'm not sure as I know what part the 118 acres exactly encompassed but this 50 acres was a separate part to any other clearing that was done.

Q. Separate and apart from any other clearing that was done under the supervision of Mr. Maehl or Mr. Metcalf? A. Yes.

Q. And now I will ask you what Mr. Maehl did with respect to that particular contract?

A. Partially completed it.

Q. Did he clear about 24 acres of it?

A. Yes.

Q. Do you recall whether he partially cleared any further amount?

A. Yes I think he did, he partially cleared some additionally.

Q. Mr. Barnard it is alleged in your counter claim in this action, with respect to that contract, that he cleared 24 acres, and then it is alleged in his

(Testimony of J. A. Barnard.)

reply that he cleared 24 acres and partially cleared 12; would you say that is some place close to the amount of work done? A. I think it is.

Q. And why, if you know, was it that nothing further was [228] done under that contract?

A. Well the progress was so far from satisfactory, the job threatened to not be completed by the time set out, and the cost was running so high, that we figured the management was bad, and it was impossible to continue, under those conditions.

Mr. Smith: I now ask your Honor, that the last answer of the witness be stricken on the grounds that it is incompetent, irrelevant and immaterial; the pleadings allege that the contract was breached and that Mr. Maehl refused to proceed with it; apparently the witness is now about to testify and has partially testified, that the company took over the contract in accordance with one of the provisions in the contract allowing them to take it over in the event the work was not proceeding satisfactorily to them; there is no allegation in the *complaint* to the effect that the work was not progressing satisfactorily or that they exercised that right given them by the contract, the pleadings simply allege that Ernest Maehl abandoned and breached the contract.

The Court: It was insufficiently pleaded but you didn't object to it. Overruled.

Mr. Smith: May we have an exception?

The Court: The exception will be noted.

(Testimony of J. A. Barnard.)

Q. Now were you there yourself at the time that the work stopped on that contract, Mr. Barnard?

A. No, not at the exact time, I wasn't there.

Q. Who paid the men that Mr. Maehl worked under that contract?

A. Barnard-Curtiss Company.

Q. And have you gone through the books of the Barnard- [229] Curtiss Company with your bookkeeper and made a computation as to the sums of money which were paid out by Barnard-Curtiss Company in connection with the performance of that contract where the 24 acres was being cleared up and while Mr. Maehl was there?

A. Yes I have.

Q. Now just detail how much money Barnard-Curtiss Company paid, the total amount?

Mr. Smith: Just a moment.

Mr. Toole: Well I haven't finished yet.

Q. (continued) In the nature of payrolls, social security, compensation insurance, bond, office expense, liability insurance, and items of that kind—have you all that, as listed in the contract here—during the time while Mr. Maehl was there clearing the 24 acres and partially clearing the balance of the 12 acres?

Mr. Smith: At this time we object to the witness testifying from this memorandum; apparently it is a memorandum taken from the books of the company; the books have not been qualified as proper account books, under the rule, as to the foundation

(Testimony of J. A. Barnard.)

to be laid for them, and it is not shown that the books are available for examination. I may state to counsel that I wouldn't object, if the books were properly qualified and if the books are available for inspection, object to a summary of this character, but I do object at this time on the grounds stated.

Mr. Toole: Well I will state to the court—of course we had a motion on that evidence some time ago—we have the books here, all the books and the vouchers, and they are all available to counsel; and we also have [230] the payrolls; they are down here in a box, quite large, and we are prepared, if necessary—I just showed them to your Honor—to prove every item that is in there——

The Court: ——Well he is merely asking *you qualify* the books.

Mr. Toole: Well Mr. Barnard, we will do that.

Q. The memorandum that you have in your lap, just state how it was made up, by whom and under whose direction?

A. Made up under my direction by the bookkeeper.

Q. And did you personally go to your own books and vouchers, the original books and vouchers, and check back on those items?

A. I checked every item I believe, so as to testify myself that he was correct.

Q. And do you have the vouchers here in Missoula from which the items were made up on the books? A. I have the books.

(Testimony of J. A. Barnard.)

Q. And are those——

A. ——And the payrolls.

Q. And are those items correctly entered in the book?

A. I notice one item in here—two items in here—that are blank, that are evidently no figures written in for them, so they are evidently not included in the figures.

Q. That is they are not—if there was no item of money then they are not included in the report?

A. Not included in the report.

Q. And does the memorandum you have in your hand correctly reflect the statements of those items, both as those where there is an item entered, and where there is no money entered, as shown from your book? [231] A. That's right.

Q. And your original vouchers or bills?

A. Yes sir.

Q. And are the books and vouchers here available to be examined? A. They are.

Q. And also the payrolls? A. Payrolls.

Q. Now state how much money you paid on the items referred to in the contract, at the time that Mr. Maehl had cleared some 24 acres and partially cleared 12?

Mr. Smith: Just a moment; I again renew my objection on the same grounds, that the books themselves have not been qualified.

The Court: Well as a matter of procedure I think the books should be produced and marked for

(Testimony of J. A. Barnard.)

identification; then if it can be shown that the books were kept in the ordinary course of business, that the entries therein were made at the time of the transactions, that they were accurately made, and made by this witness or someone acting under his direction or by his authority, I think that is what counsel is getting at.

Mr. Smith: Yes.

Mr. Toole: Well, we will start over again.

The Court: Well let's start as the court suggests, by producing the books and having them marked for identification.

Mr. Toole: Very well we will get the books.

Q. Now Mr. Barnard these are the payrolls?

The Court: In those payrolls weren't some book [232] entries made?

Q. Did you take those from the payrolls?

A. These figures came from the books, not directly from the payrolls.

The Court: I think you should get the books and submit them to counsel.

Mr. Smith: May it please the court at this time I would like to renew a motion to strike that I made; the court has already ruled on it, but if the court will indulge me, I would like to call the court's attention to the fact that the question that was asked the witness was not indicative enough of the answer that followed that I could anticipate just what the witness would testify; consequently I waited for the answer and then asked that the motion to strike be

(Testimony of J. A. Barnard.)

made; while I realize it is purely in the discretion of the court, I would like to renew the motion.

The Court: Well the court feels that the motion comes too late; if the form of the question did not inform you sufficiently of what might be stricken you should have objected on the ground of uncertainty; having failed to do that the motion comes too late. How long will it take to make this examination? Will 15 minutes be enough?

Mr. Toole: Well it depends on how hard counsel gets.

The Court: Well that isn't a question.

Thereupon, with the usual admonition by the Court to the jury, recess was had from 2:35 to 2:50 o'clock p. m. of said day, at the end of which the trial was resumed.

Mr. Toole: Now I will state to the court that we [233] have here the Barnard and Curtiss ledger, and in addition to that we have the original payroll, and further back than that, the original timebook; and we are prepared to offer them all or to make them all available to counsel either by introducing them in evidence or in any way that counsel desires them; the reason I state that is this, that if counsel takes only the ledger that contains only the totals and it would be of no particular information to him if he wants to make an audit. What I propose to do here is to qualify them all and then perhaps let the court and counsel say as to which should be introduced.

(Testimony of J. A. Barnard.)

I'm going to offer them all, but I think that will make a tremendous record.

The Court: It will make a record that would be too cumbersome for any useful purpose.

Mr. Smith: I would be perfectly satisfied, your Honor, if each book that was used in making the computation that has been made, is properly qualified as an account book; if it can be admitted and testified that the memorandum is made from that book and if the book is made available for our inspection so we may see it, without the necessity of introducing it in evidence.

Mr. Toole: Well then, if your Honor please, I will hand Mr. Barnard the ledger.

Q. And also I will give you this same memorandum that you had, Mr. Barnard; and you have in your hand the ledger of the Barnard-Curtiss Company, one of the regular books of the company?

A. The ledger.

Q. Yes, is that the ledger, so called, of the Barnard-Curtiss Company? [234]

A. Yes.

Q. Now is that a book which is regularly kept as a practice in all of the work by Barnard-Curtiss Company?

A. This is the Flint Creek dam project ledger and is only that job.

Q. And is it the kind of book that Barnard-Curtiss Company keeps in the regular course of

(Testimony of J. A. Barnard.)

its business on that project and all other projects?

A. It is.

Q. Which would be during the period of time from the commencement of this job until the present time?

A. It was on the job the entire period of construction until it was completed and then after that it was in Minneapolis.

Q. And that is your head office, in Minneapolis?

A. Yes.

Q. And then sent from Minneapolis here by you?

A. Yes.

Q. And now with respect to the entries in the ledger, just tell us how those entries are made, that is, take the labor item for instance, is the time kept in a timebook on the job?

A. It is up to—for a short period in the beginning of the job, and that is taken from time slips and entered on the payrolls.

Q. Now are the time books and the time slips all here? A. I think they are.

Q. So that you kept the time on this job in a small timebook, an ordinary timebook, showing the day of the week and the name of the man and the number of those working and the amount of the pay, is that right?

A. We used a system of time slips. [235]

Q. I mean at first?

A. At first the foreman kept the time in a timebook.

(Testimony of J. A. Barnard.)

Q. And then that was submitted by the foreman to your office, at the job?

A. Yes.

Q. And after October 4 I think you said that you changed to the system of time slips?

A. That's right.

Q. And each man kept his own time, did he, usually on those time slips?

A. Turned in a slip every day, and we check it and file it and enter it.

Q. Are all those time slips here in the court room?

A. The time from the time slips that the men delivered to us and signed individually are taken off by the timekeeper and entered on these time slips that we have.

Q. And are your time slips here?

A. They are all here.

Q. And from the time books and the time slips what is done with them?

A. Entered on the payrolls.

Q. And then from the payrolls where are they entered? A. In the book.

Q. And the payrolls are all here are they?

A. Yes.

Q. And then into the ledger, as you speak of?

A. Yes.

Q. Now is that all done regularly and in the course of business in your work?

(Testimony of J. A. Barnard.)

A. That's right. [236]

Q. Under whose general management and supervision is that done? A. Mine.

Q. And have you in your experience learned then that the result on the ledger is a correct result, as a result of that system? A. It is.

Q. Then does that ledger correctly reflect the items that appear upon it?

A. You mean in general or as to payrolls, now, are you speaking of?

Q. No I am just asking if the items entered on the ledger are correct? A. Yes they are.

Q. And as to the time of these entries how are they—how soon after the man works, or after the matter is determined, are the figures made or the entries made?

A. Well promptly, usually within a week, not longer than a week.

Q. And are they made either at the time of the act or event, that is, either at the time the labor is rendered or the matter determined, within a few days thereafter?

A. A few days thereafter.

Q. So that the ledger which you have in front of you is a correct—is the ledger that you have in front of you a correct business entry kept in the ordinary course of business, under your supervision, and according to the method which you have described? A. It is.

Q. Now then, did you then have your book-

(Testimony of J. A. Barnard.)

keeper, under your [237] supervision, take off the items from the ledger and put them on the yellow sheet which you have in your hand? A. Yes.

Q. And just open that please?

A. (Witness does so)

Q. Now with respect to the item there which has to do with the expenditures made by Barnard-Curtiss Company on the first 24 acres cleared by Mr. Maehl under the written contract, 50-acre contract, plus whatever additional clearing he did—will you tell us what the total expenditures were? Now tell us, first, if those are items which were taken off of the ledger and transcribed to that sheet just for your ready reference, is that right?

A. That's right.

Mr. Smith: May I ask a question?

Mr. Toole: Yes.

Q. (Mr. Smith): Do all of the items which appear on that sheet, Mr. Barnard, appear in the ledger?

A. No they don't—they do in some form or other but not on the account that we took them from last.

Mr. Toole: I was going to ask that.

Mr. Smith: All right.

Q. The items on the sheet which you hold were transferred from the ledger, were they, for your reference? A. Yes sir.

Q. Ready reference? A. Yes.

Q. Now there are some items there—in the first

(Testimony of J. A. Barnard.)

place I notice two items on the sheet, which have just a blank line? A. Yes. [238]

Q. How do you explain that?

A. There had been no figure allocated to this record account from any of the other expense accounts, apparently, so that we left it off.

Q. Where is the first item on—now have in mind we are talking now about the time when Mr. Maehl was on the job, not after he left—what is the first item there? A. Labor.

Q. Is the item of labor a book item taken off of the ledger? A. Yes.

Q. And how much is it? A. $4301.30.

Q. Then as I understand you Barnard-Curtiss Company paid $4301 in labor for—$4301.30 in labor—on the 24 acres that Mr. Maehl cleared and where he partially cleared another 12 acres?

A. That's right.

Q. And what is the next item?

A. Compensation insurance.

Q. And is that an item that is in your ledger?

A. It is, under the head of compensation insurance.

Q. Tell me whether or not it appears in your ledger in exactly the amount that appears on the yellow sheet? A. No.

Q. And why is that?

A. Well it was a flat rate applied to all labor, and we when we used the rate reduced the total amount of labor to arrive at the figure.

(Testimony of J. A. Barnard.)

Q. Yes. Now calling your attention, for instance, to [239] the contract between you and the State Water Board, Defendant's Exhibit 13, is there a clause in that contract which requires you to carry compensation insurance? A. There is.

Q. Not only upon your own help but on those of sub contractors? A. There is.

Q. And so were you carrying that compensation, workmen's compensation insurance, upon the employees who were working for Mr. Maehl under the written contract of January 18?

A. We were.

Q. And is the compensation insurance correctly, the total amount of compensation insurance, correctly detailed upon your ledger? A. Yes.

Q. And that was the total amount for the whole job, is that so?

A. That is the total amount for the whole job.

Q. Then did you allocate some proportion of the amount of that to Mr. Maehl's employees?

A. I did.

Q. And how much did you allocate?

A. This carries $193.18.

Q. Does $193.18 represent that proportion of the total compensation premium which Mr. Maehl's employees—the pay of Mr. Maehl's employees—bears to the total payroll?

A. May I have that question again.

Mr. Toole: Just strike that question.

(Testimony of J. A. Barnard.)

Q. Was that a proportionate allocation on Mr. Maehl's employees? [240]

A. This figure represents both compensation and public liability.

Q. Well was there a provision also in the contract that requires you to keep public liability insurance? A. Yes.

Q. On sub contractors as well? A. Yes.

Q. Well then is that item of $193.18 a proportionate allocation as against Mr. Maehl's share or part of the entire job?

A. It should be correct.

Q. What is the next item?

A. Feed and tools.

Q. Have you an entry on your ledger for that amount? A. I will have to look.

Q. Well can you find it?

A. I think I can.

Q. See if this will help you any?

A. These figures that you are asking me about is $55.48, is evidently made up of several items off of the ledger here and added up on this here.

Q. They appear on the ledger do they?

A. They appear on the ledger in various smaller items but they are added up on here.

Q. And the total amount of that item is $55.48?

A. The total amount of that item is $55.48?

Q. And what is the next item?

A. Rental of horses.

(Testimony of J. A. Barnard.)

Q. Did you rent some horses up there or rent them, turn them over to Mr. Maehl, and pay the rent on them? [241]

A. Yes.

Q. How much did that amount to?

A. That amounts to $50.84.

Q. What is the next item—that appears on the ledger?

A. In various items the same as the former one, added up.

Q. Now what is the next item?

A. Labor bond.

Q. And tell us what a labor bond is?

A. Well it is a requirement of the Water Board that we have to furnish.

Q. And does it appear in the contract between yourself, Barnard-Curtiss Company, and the Water Board, that labor bond? A. Yes.

Q. In fact it is a part of that contract isn't it?

A. Yes.

Q. Requiring you to procure a labor bond to guarantee the payment of wages?

A. Yes sir.

Q. How much is that?

A. That is one percent of the $4301—$43.00.

Q. That is, one percent of the payroll?

A. Yes.

Q. And that percentage was taken on the men employed by Mr. Maehl, is that right?

(Testimony of J. A. Barnard.)

A. That's right.

Q. What is the next item? A. That's all.

Q. And what is the total?

A. $4779.84. [242]

Q. Well then as I understand you, Barnard-Curtiss Company during the time while Mr. Maehl was clearing the 24 acres and part of a few other more acres, advanced for his account or paid those items of his labor and under the contract—under his contract? A. Right.

Q. Now did Mr. Maehl then finish that contract? A. No he didn't.

Q. I think you said that things weren't going right, or something like that——

Mr. Smith: ——Object to any further evidence on this line on the ground that it is incompetent, irrelevant and immaterial and an attempt to show the exercise of a right by Barnard-Curtiss under the provisions of the contract when the same is not pleaded.

The Court: Objection overruled.

Mr. Smith: May we have an exception?

The Court: Surely.

Q. Then after Mr. Maehl left there what happened to that 50 acres of clearing?

A. We finished the job.

Q. You say we—who?

A. Barnard-Curtiss Company, yes.

Q. And have you a record as to how much was expended by you in finishing that job?

(Testimony of J. A. Barnard.)

A. Yes.

Q. Where is that?

A. Well I have drawn it off here—had it drawn off on this sheet here.

Q. Have you done about the same thing with that that you [243] did in the first part of the work?

A. Yes.

Q. That is do you show a series of items showing the expenditures of Barnard-Curtiss Company in order to finish the job after Mr. Maehl left?

A. Yes.

Q. And are those items taken from your ledger in the same way as the items you have just testified to? A. In the same manner.

Q. And how much money did Barnard-Curtiss Company expend in completing the job, in completing that 50 acres of clearing?

A. This part?

Q. Yes.

A. $6862.85 was taken off of the books.

Q. $66——

A. ——$6862.85.

Q. Now tell me again what the total was, paid out during the time when Mr. Maehl was on the job?

A. $4779.84.

Q. Have you ever totalled those two?

A. No.

The Court: Those are all the figures set out in paragraph 2 of your second affirmative defense?

(Testimony of J. A. Barnard.)

Mr. Toole: That is correct your Honor.

Q. Well Mr. Barnard I made a rapid calculation and added those two figures, but they appear to me to add to $11,642.69; will you do that?

A. I got $11,642.69.

Q. Well now tell me then what is the total amount of money [244] expended by Barnard and Curtiss as shown by your sheets for both including the money advanced or paid out while Mr. Maehl was there, plus the money expended by Barnard and Curtiss Company on that 50 acres after he left? A. $11,642.69.

Q. Right. And Mr. Maehl had the contract for $100.00 an acre, did he not?

A. That's right.

Q. There were 50 acres, you say?

A. Approximately.

Q. Now multiply 50 by 100, what do you get?

A. 5000.

Q. Had Mr. Maehl finished the contract at $100.00 an acre Barnard-Curtiss Company would have spent how much? What would it have cost, under the contract? A. About $5000.00.

Q. And now make a calculation and tell me how much the excess was expended by you on that 50 acres over and above the contract price?

A. Well I would say the difference between $5000.00 and the $11,642.69 would be $6642.69.

Q. $6642.61?

A. Yes.

(Testimony of J. A. Barnard.)

Q. Would be the amount expended by you on that 50 acres in excess of the contract price, is that right? A. That's right.

Q. Now you testified Mr. Barnard that—or did you—what was your conversation with Mr. Maehl with respect to clearing on the dam site?

Mr. Smith: Objected to as repetition; the matter [245] was covered this morning.

Mr. Toole: Well if your Honor please there is an allegation in the answer that the clearing on the dam site, that 6 or 7½ acres, was a separate contract from the other, and Mr. Maehl apparently takes the position that it was not separate; I think we should be permitted to show it was a separate contract and that we had to go in and do that also.

The Court: Yes it is a part of your first counter claim. The objection is overruled.

Q. Did you have a conversation with Mr. Maehl with respect to clearing on the dam site alone——

A. ——I don't think so.

Mr. Toole: Well I think then, if your Honor please, that in view of that we ought to dismiss that first counter claim on the $754.00.

The Court: Well on motion of the defendant his first counter claim is dismissed. I take it you have no objection?

Mr. Smith: We have no objection.

The Court: With the consent or by the consent of the plaintiff.

(Testimony of J. A. Barnard.)

Mr. Smith: Turn about is fair play.

Mr. Toole: Now I think I should offer in evidence, if counsel wants them, the payrolls, all of the payrolls on the project; do you want those in the record?

Mr. Smith: If you will just leave them here so that we can look at them that will be satisfactory.

The Court: The court wouldn't care to have all that mass of papers introduced in evidence. [246]

Mr. Toole: Then, if your Honor please, the ledger, we won't offer that now unless counsel wants it; we will make it available to them, though, and give it to counsel.

The Court: Well now while we are at this point —because of the limited help in the clerk's office it will not be possible for the court to require anyone from that office to remain here; will it be agreeable to counsel that these papers are kept open to their inspection in Mr. Toole's office or would it be agreeable to Mr. Toole and the defendant here to have these papers and books delivered to Mr. Smith or the attorneys for the plaintiff, or can we put them in some place agreeable to both where they will be subject to inspection by either?

Mr. Toole: I think that will be best; I don't like to have them there, there are so many of them, not because I don't trust counsel but if some were lost I believe we would wonder where they went; we might leave them in Murphy and Whitlock's office.

(Testimony of J. A. Barnard.)

The Court: What would Murphy and Whitlock think about that? Well in the meantime agree on some place of deposit so that we may make a proper order. Proceed.

Mr. Toole: Well I think that's all for Mr. Barnard just now; I might want to call him back.

The Court: Very well, under proper showing and request you may recall him. Cross examine.

Cross Examination

By Mr. Russell Smith:

Q. You first talked with Mr. Maehl about the clearing matter in 1938, as I understand you—1935? A. 1935 yes. [247]

Q. And at that time you went up to the dam and more or less looked the job over? A. Yes.

Q. Do you know, Mr. Barnard, if there was any grubbing specifically noted in the Water Conservation Board contract at that time?

A. There was.

Q. There was some? A. There was.

Q. That was in 1935? A. Yes.

Q. And then events so transpired that you didn't get the contract in 1935? A. That's right.

Q. And you subsequently learned that the contract was being readvertised and new bids would be accepted? A. Yes.

Q. So in 1935 you—or 1936, and about August—would that be correct?

A. I think substantially so.

(Testimony of J. A. Barnard.)

Q. You saw Mr. Maehl up on the West Fork?

A. It might have been July, but somewhere along in there.

Q. And as I recall you said that you asked him if he was still interested in clearing?

A. Yes.

Q. And he said yes; and that conversation took place before you made your bid to the State Water Conservation Board didn't it? A. Yes.

Q. Then subsequent to that when you had your conversation [248] you made your bid to the Water Conservation Board and it was accepted?

A. Yes.

Q. And you then got in touch with your brother Bob? A. That's right.

Q. Or Robert, and told him to have Mr. Maehl get busy at the dam site, is that a fact?

A. Yes.

Q. I think you said you didn't know whether it was by wire or letter? A. To Bob?

Q. Yes.

A. I couldn't recall how it was.

Q. And I assume you don't now have the communication here, whatever it was? A. No.

Q. You were present at the work that was going on up there, off and on during the whole course of construction, were you? A. Yes.

Q. You would be there for a few days and go away and—— A. ——Yes.

(Testimony of J. A. Barnard.)

Q. You testified this morning, or this morning and this afternoon, about some estimate sheets; this one was introduced in evidence and I think the others were not; these estimate sheets were not necessarily a complete statement of the work done to date were they?

A. They are supposed to be accurate.

Q. Well they are the thing that you get paid your advanced payments are they not?

A. Yes. [249]

Q. And there would be no requirement that you necessarily include all the work done to any given day, would there?

A. Well we watched them pretty close.

Q. Well of course as a matter of fact in this first one——

A. ——There wasn't anything done on this one.

Q. The statement reads "On account of so little work being done"?

A. Yes, no estimation.

Q. Apparently some work had been done?

A. A little, but it wasn't worth while to estimate.

Q. So it actually wasn't necessary to report every bit of work done was it?

A. We would see that we reported practically all of the work that we had done each month.

Q. And could you, if you omitted to include work one month, include it in another month.

A. It could be.

(Testimony of J. A. Barnard.)

Q. And I suppose that was done with any work that was not reported on estimate sheet number 1?

A. If there had been some work, number one would come in the next estimate.

Q. Will you show me on these sheets, Mr. Barnard, where you took your figure with respect to the work done on the dam site?

A. The first item.

Q. Here? A. Yes.

Q. Item number 2 united or lumped with—acre, is that? A. That is acre.

Q. Then when was the entry made? [250]

A. That is the preliminary estimate made by the Water Board on their form and that is the original set up figure.

Q. And this?

A. Actual work done on this estimate for this period.

Q. And to date? A. With the total.

Q. And uncompleted?

A. That is their estimate, the engineer's estimate of the amount of work still to be done.

Q. And in this particular case that was incorrect, wasn't it? A. Well it was pretty close.

Q. Well as I understand the dam site only had 6.98 acres in it?

A. That would total up to—yes that is incorrect—that is the uncompleted figure—that is incorrect.

(Testimony of J. A. Barnard.)

Q. You have told, Mr. Barnard, about the written contract that you entered into on behalf of the construction company with Mr. Maehl and you have also testified that the matter was going too slowly to suit the company? A. Yes.

Q. Costs were running too high? A. Yes.

Q. Were you present at the time that anything was done with respect to computation of the job?

A. No I wasn't.

Q. Who was present at that time?

A. R. W. Barnard, Bob Barnard.

Q. Was he there all the time during that—say from January 18 to March 15 or thereabouts? [251]

A. No he wasn't.

Q. What time did the company take over the 50 acre job?

A. I think about that time, January 18—my recollection may be wrong.

Q. No I think you are mistaken, I think the contract was made about January 18, wasn't it?

Mr. Toole: That's right.

A. I may have that wrong.

Q. Yes, I think the contract was made about the 18th?

A. I would have to refer to the record to answer that question.

Q. So you don't actually know when the job was taken over by the company?

A. No I couldn't answer it without referring to the record, exactly.

(Testimony of J. A. Barnard.)

Q. Would you know approximately when that was done?

A. I would say some time in February, as near as I could say.

Q. And did you say before your brother Bob was present at that time? A. Yes.

Q. The contract I note in the second page has a provision—"A special condition of this agreement is that if at any time in the judgment of the engineer in charge or the party of the first part . ."; who was the engineer in charge of this job during that period of time?

A. Mr. H. A. Higgins.

Q. That is the engineer in charge of—he was in charge of the Water Conservation Board?

A. Yes sir. [252]

Q. Did you have any written communication while you were gone, with anybody at the job, with respect to the progress Mr. Maehl was making on this 50-acre job? A. I think we did.

Q. Do you have any of that correspondence here?

A. I couldn't say unless I looked at the record again, to know definitely.

Q. And with whom would that correspondence have been? A. Mr. Strickland.

Q. Was he advising you of the general course of the work? A. Yes.

Q. Was Mr. Strickland at that time—what was he, a laborer?

(Testimony of J. A. Barnard.)

A. He was in charge of the job in the absence of R. W. Barnard in the month of January.

Q. Was any other person other than Mr. Strickland out there at that time?

A. Not in charge.

Q. Would you say that Mr. Strickland was superintendent? A. Yes at that time.

Q. And he reported to you from time to time about the progress of the job? A. Yes.

Q. And did you give Mr. Strickland any instructions as to what should be done?

A. Yes.

Q. And what were those instructions?

Mr. Toole: I think that is objected to as immaterial; it is admitted in the reply that the work was not done, and the contract provides that any amount spent in completing the job shall be charged against any sums due Mr. Maehl. [253]

Mr. Smith: Well it has gone in that the work was going too slow and the costs getting too high and I was just trying to find out the situation that existed at that time.

The Court: Overruled.

Mr. Toole: Note an exception.

The Court: Exception noted.

Q. (read by reporter) And what were those instructions?

A. That R. W. Barnard would be on the job soon and to be guided by his instructions to him.

(Testimony of J. A. Barnard.)

Q. And when did R. W. Barnard go on the job, do you know?

A. I couldn't tell you the exact date.

Q. Do you know about them?

A. It was in February.

Q. He went on the job in February; and was he there during all that time—was he there during all the time from February until the middle of March? A. Oh yes.

Q. In testifying as to the cost on the—during the time that Mr. Maehl was—had this 50-acre contract, you testified I believe that you charged him with public liability insurance and compensation insurance? A. That's right.

Q. Now the compensation insurance, is that figured on a certain percentage of this payroll?

A. It is a flat rate charged by the state.

Q. What is that rate?

A. My remembrance is it was 3½ percent.

Q. And the public liability insurance, just tell the jury what the public liability insurance covered?

[254]

Mr. Toole: I think we will object to that as hearsay, calling for a conclusion, and immaterial; the contract with the State of Montana required this firm to carry public liability insurance on itself and all of its sub contractors, and the only evidence as to what that public liability insurance is or what kind of insurance it is, would be to produce the policy.

(Testimony of J. A. Barnard.)

Mr. Smith: What I'm trying to get at, your Honor, is the basis on which the public liability insurance was allotted.

The Court: As I understand it there is an allegation made; counsel would have a right to inquire on that. Overruled.

Mr. Smith: Let me ask it this way.

Q. Public liability insurance is the type of insurance that contractors and other people carry to protect them against loss brought by third persons, is it not, in event of damages growing out of the work, or something of that sort?

A. That's right.

Q. And this charge, whatever portion of the $193.18 that was allocated to public liability insurance, doesn't represent a definite policy taken out on Mr. Maehl's contract or by reason of his work?

A. No a general policy.

Q. And what basis did you use in making that allocation?

A. The rate named in the policy, and which was paid.

Q. Well what was the rate named in the policy based on?

A. I would have to have the papers.

Q. Have you got the policy here? [255]

A. It is here.

Whereupon with the Court's usual admonition to the jury recess was had from 3:27 until 3:45 o'clock p. m., when the trial was resumed.

(Testimony of J. A. Barnard.)

Q. I see by this public liability policy that the rates which the premium charges are based on the men employed? A. Yes.

Q. And in making your computation was the computation made on the number of men employed?

A. That's right.

Q. Now you said I believe that all of the items which appear in your memorandum from which you testified appear at some place or other in the ledger? A. Yes.

Q. And the ledger reports were taken from other papers is that true? That is, the figures which appear on the ledger were compiled from other records that you had? A. Yes that's right.

Q. And the labor would be computed from the—

A. ——From the payrolls; from the paid payrolls.

Q. And these green sheets here?

A. They are the paid payrolls.

Q. When you say paid payrolls you mean the money actually paid? A. Yes.

Q. When did Barnard-Curtiss finish the clearing on this 50 acres?

A. The last of May I think, as near as I can recall, or the first of June.

Q. And at the time that Barnard-Curtiss took over this [256] job you had approximately 26 acres to clear of which 12 had been partially cleared, is that right? A. That's right.

(Testimony of J. A. Barnard.)

Q. And the cost as you gave it in the clearing of the 26 acres of which 12 had been partially cleared, was $6642.69?

A. I think that is correct.

Q. Look at that sheet, will you, and get that?

A. $6862.85.

Mr. Smith: I think that's all I have with this witness; I may have further questions, if we may have an opportunity to look at some of these records, if that might be understood.

The Court: Yes, you will be excused, subject to recall.

Redirect Examination

By Mr. Toole:

Q. Did you see the condition of the 50-acre tract after Mr. Maehl had cleared the 24 acres and part of the other? A. Yes.

Q. What was its condition?

A. In general or in detail?

Q. Well pretty detailed?

A. Well the 12, and the part that remained uncompleted, was in very bad condition; the timber was slashed down and the snow had come up on it and it was getting to be a very tough job to dispose of it, pile it and burn it; the progress was evidently not as well along as it should be in order to complete the job in the contract time; it just didn't seem to be the proper effort of accomplishing the work there to be done, in the time we had to do it.

[257]

(Testimony of J. A. Barnard.)

Q. You were asked, just the last question, about, I think, that it cost Barnard-Curtiss Company $6862.85 to finish clearing 26 acres, part of which had been cleared; now how do you account for that high cost, if it is a high cost?

A. Well for those reasons that I just mentioned.

Q. Well now what had actually been done, due to the trees falling?

A. The timber had all been slashed so that it was lying criss-cross all over the lot.

Witness Excused.

R. W. BARNARD

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

By Mr. Toole:

Q. Your name is R. E. or Bob Barnard?

A. Yes sir, R. W.

Q. You are a brother of James Barnard who was just on the witness stand? A. Yes.

Q. Are you employed by Barnard-Curtiss Company? A. Yes sir.

Q. In what capacity? A. Superintendent.

Q. Were you on the Philipsburg job a part of the time? A. Yes sir.

Q. And are you acquainted with Ernest Maehl?

(Testimony of R. W. Barnard.)

A. Yes sir. [258]

Q. Were you there when Ernest Maehl first went to work?

A. I was there—you mean what time?

Q. Well in September of 1936?

A. Yes sir.

Q. There was introduced in evidence yesterday a document marked Defendant's Exhibit 2, bearing Mr. Maehl's signature, called assignment slip; have you seen that before? A. Yes sir.

Q. And just state, but without stating its contents, but what it is?

A. Well it is a National Re-employment slip; every man had to have a slip and the number that he worked on the job.

Q. And on that slip, Mr. Barnard, it appears to state that he was employed as a laborer at 60 cents an hour, is that correct?

A. On the ticket here, yes, that is what it says on the ticket.

Q. And subsequently was another slip issued, a socalled re-classification slip? A. Yes.

Q. Now that has been marked here — it was marked yesterday, as Defendant's Exhibit 3; can you identify that slip? Have you seen it before?

A. Yes sir I made it out.

Q. You made it out? A. Yes sir.

Q. Signed it—that is your signature?

A. Yes sir.

Q. And does it have reference to Ernest Maehl?

(Testimony of R. W. Barnard.)

A. Yes sir. [259]

Q. With respect to his employment?

A. Yes.

Q. Wage rate and so forth? A. Yes.

Q. And was that on the job at West Fork?

A. That was on the dam job.

Q. That is the job we have been referring to all the time? A. (No answer)

Q. Dated September 3, 1936; and would that be about the time that Mr. Maehl had gone up there, a few days later?

A. Well that was later, he went up the 24 of August.

Q. He went up there the 24 of August; the assignment slip is dated August 20, is that right?

A. That's right.

Q. And he appeared on the 24 of August as you recall? A. Yes.

Q. And the reassignment slip which I have handed you, Exhibit 3, or reclassification slip, is dated September 3? A. That's right.

Mr. Toole: I offer Defendant's Exhibit 3.

Mr. Smith: May I ask a question?

Mr. Toole: Yes.

Q. (Mr. Smith) Did Mr. Maehl ever see this document?

A. Well in the first payroll when he wasn't classified right, he was classified as a laborer, he protested, and I had him reclassified, and had to make out the slip and the engineer in charge of the work

(Testimony of R. W. Barnard.)

had to o. k. it—I think it is on there—Mr. Griffith he was the engineer on there at that time.

Mr. Smith: All right. [260]

The Court: It is in evidence without objection

Thereupon was received in evidence without objection the instrument referred to, identified and marked Defendant's Exhibit 3, read to the jury and the same being as follows:

DEFENDANT'S EXHIBIT 3

WPA Form RECLASSIFICATION SLIP

Employee's name—Ernest Maehl.

Identification No. 3120-116.

Address—Philipsburg, Montana.

Date—Sept. 3, 1936.

Certified from relief rolls ( )

Case No. ..... Relief dist. .....

Nonrelief person (x)

Now working as Laborer Code ..... Wage rate .60 per hour on Project No. 1009-R-)3 at Flint Creek Dam Granite County. A change in occupation is recommended for the above named person:

To Foreman Code ..... Wage rate .85 per hour.

Explanation:

(1 To Pay Roll Unit)

By R. W. BARNARD

(Foreman or Supervisor)

Approved by Clifford Griffith, Project Eng.

Effective date Sept. 1 - 1936.

This form is to be used Only for change in occupational or wage rate classification occurring during

(Testimony of R. W. Barnard.)
employment on one project. It is not to be used for transfers or reassignments. [261]

Q. Now can you identify the signature of Mr. Griffith? Was he the engineer up there?

A. Yes.

Q. Did you have him sign that slip?

A. Yes sir.

Q. And at the time that that was signed was Mr. Maehl then transferred on your payroll from a laborer to a foreman? A. Yes sir.

Q. And from that time on carried as foreman at 85 cents per hour? A. Yes sir.

Q. Up to that time—that is, from the time he went up there on August 24—I take it, until the date of that reclassification, September 1, he worked at 60 cents an hour? A. That's right.

Q. Tell me how it came about that that reclassification slip was issued?

A. Well he had been working under a foreman at 85 cents an hour, before, in other work.

Q. When you say other work what do you mean?

A. Well road work.

Q. Over on West Fork road job?

A. Yes, and in some way in the first slip there was a mistake, he got put down as a laborer instead of foreman, so we reclassified him to the proper assignment in the payroll.

(Testimony of R. W. Barnard.)

Q. And how did you come to do that, did you have a conversation with him about it?

A. Yes he wasn't used to getting paid 60 cents an hour.

Q. Just tell us what the conversation was, when it was and where it was? [262]

A. Well as I remember it was when the first payroll checks came out, his check was on a labor rate and there was a protest made.

Q. Well who made the protest?

A. I think Mr. Maehl did.

Q. Do you remember what he said?

A. No I don't.

Q. About what he said?

A. Well I imagine there was a wrong rate.

Q. Did he say it to you?

A. Well I couldn't say; we had a bookkeeper there.

Q. Did you sign a reclassification slip?

A. At that time I was notified and I went in and reclassified him.

Q. And assigned him a job as foreman?

A. Yes.

Q. You yourself signed that slip reclassifying him? A. Yes.

Q. Then you were up there on the job when he first went out on it along August 24; and state what Mr. Maehl did, actually what work he did, from August 24 until September 11?

(Testimony of R. W. Barnard.)

A. Well he started clearing and grubbing the dam site August 24.

Q. Did he take a crew of men up there?

A. Yes sir.

Q. And have you looked through these payrolls to see if you could find those particular payrolls where he appeared there on that work?

A. Well it was the first payroll on the job. [263]

Q. And how long a time was he engaged upon the work on the dam site?

A. I would say around three weeks.

Q. Do you recall that it was until September 11?

A. Well it was in there some time.

Q. Then what happened?

A. Well we had to remove him, another camp at the road job over at the dam, and we sent him over there to set up the camps.

Q. To set up the camps where?

A. At the dam site.

Q. And did he go to work then putting up camps at the dam site?

A. No, back of the dam site, at the camp site.

Q. And how long was he occupied at that, do you know?

A. Well he worked there until he became ill.

Q. Was he carried on the payroll at 85 cents an hour during that period? A. Yes.

Q. And you say he worked there until he became ill? A. Yes.

(Testimony of R. W. Barnard.)

Q. About when would that have been, do you know?

A. Well I think it was around November 9.

Q. You heard that said here yesterday; does that fit your recollection all right? A. Yes.

Q. And then where did he go, do you know?

A. Well he was over at the hospital in Butte.

Q. And when was the last time you saw him up there at the camp site where he was building camps? [264]

Mr. Toole: I will withdraw that.

Q. That is, do you know that he was there building camp until he became ill? A. Yes.

Q. About November 9? A. Yes.

Q. And then went to the hospital in Butte?

A. Yes.

Q. And when did you next see him?

A. Well I saw him in the hospital there.

Q. And you went over to see him did you?

A. Yes.

Q. Did you have any conversation with him?

A. Well on his general health.

Q. And then did he come back to work later?

A. Yes he came on the job around December 28, after Christmas, after the holidays.

Q. Were you out there then? A. Yes.

Q. And what did he do then?

A. He was up clearing.

Q. Well now going back to the time when he

(Testimony of R. W. Barnard.)

moved from the work on clearing the dam site and went to building camps, how much of the dam site had been cleared, do you know? Had it all been cleared? A. No.

Q. And grubbed? A. No.

Q. Do you know about how much of it had been?

A. Oh I would say 70 percent, somewhere in there. [265]

Q. When was the dam site finally cleared, if you know, or grubbed and wound up?

A. In May.

Q. In May of when? A. 1937.

Q. And was Mr. Maehl on the work at that time? A. No sir.

Q. When is the last time he was on the work?

A. Well in March.

Q. And who did the work of grubbing, finally finishing the grubbing and clearing the dam site?

A. Well the work was under the supervision of Mr. Strickland.

Q. And was he your superintendent?

A. Yes.

Q. Then was the work done by Barnard-Curtiss Company? A. Yes.

Q. Do you recall having seen Mr. Maehl there at work on—or are you familiar with the area which is covered by the 50-acre contract, the written contract? A. Yes.

Q. Is that an area which Mr. Metcalf ever had anything to do with, by the way?

(Testimony of R. W. Barnard.)

A. No he never was in there—on the first part of it, when we went in after Mr. Maehl went off of it, Mr. Metcalf went in under Mr. Strickland's supervision, cleaning it up and finishing the contract.

Q. Where was that? A. On the 50 acres.

Q. But what I want to get at is whether or not the 50 [266] acres was any part of the 118 acres referred to by Mr. Maehl, or 107½ referred to by Mr. Hensolt?

A. No that was a separate piece of work altogether.

Q. And do you recall about how long Mr. Maehl spent up there on the 50 acres, under the 50-acre contract, written contract.

A. Well I came back on the job early in March, I had been away, and that was when we took it over, when I came back.

Q. What was the condition of it at that time, of that area, the 50-acre area?

A. Well a lot of timber had been slashed down and it hadn't been attended to and it hadn't been cleaned up as it was cut, and it was under a lot of snow and brush and everything together and it was in bad shape.

Q. And had that clearing on that contract, or that 50-acre contract, gone along and in the usual way, being cleared and cut as it went along?

A. Not the way we were doing it on the other jobs up there.

(Testimony of R. W. Barnard.)

Q. What was particularly different about that than the other?

A. Well no burning, there was no burning of the cut.

Q. What?

A. There was no burning of the timber as it was cut.

Q. And what was the result of that?

A. Well snow and it would get wet and be tough to burn, you have to snake it out and pile it up and it is hard to burn.

Q. And what have you to say whether or not the cutting was half of the burning off there or something? A. Yes. [267]

Q. Tell me a little more in detail just what was wrong what had happened, what the actual physical condition there was, in more detail, in that tract when you came back there?

A. Well when the contract started there was nothing cleaned up, they just kept going ahead and the timber was down and there was not much of an attempt being made to dispose of it; the toughest job there was the burning of it.

Q. Had the burning been kept up before?

A. No.

Q. How about the other part of the clearing?

A. Well they had up there a place where the partial clearing was done some slashing of the trees up there that wasn't cleaned up, they were down and crisscrossed and hard to get at.

(Testimony of R. W. Barnard.)

Mr. Toole: Now if I may state to the court, it has not been denied and no objection has been made by counsel as to the fact that Mr. Maehl was carried on the payroll here as testified, for a while at 60 cents and for the balance of the time at 85 cents; and if the record may be made to show that he was so carried during the period August 24 to January 16, I won't put in these payrolls.

Mr. Smith: Well I think that is a fact.

The Court: Very well let the record show that it is so stipulated.

Mr. Smith: In that connection, Mr. Toole, may the record show that from January 18 until March 15 or thereabouts, he was also caried on the payroll at 85 cents an hour;

Mr. Toole: That's right, and the record may so show. [268]

Cross Examination

By Mr. Russell Smith:

Q. You were taken sick yourself, weren't you, some time during that winter?

A. Yes around the first of January.

Q. And you were in the hospital were you?

A. Yes.

Q. And approximately how long were you there?

A. Well I left the job somewhere around the first week of January and returned I think it was the first week in March.

Q. And who was in charge of the job while you were gone? A. Oscar Strickland.

Witness Excused

OSCAR STRICKLAND

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

By Mr. Toole:

Q. Your name is Oscar Strickland?

A. Yes sir.

Q. What is your business?

A. I am superintendent of construction for Barnard-Curtiss Company.

Q. How long have you worked for them?

A. About 20 years.

Q. Were you at any time on the Flint Creek dam job? A. Yes sir. [269]

Q. When did you go there?

A. I went there on the 24 of December 1936.

Q. And then how long were you there after that?

A. I was there until the job was completed, I can't say the date.

Q. Well some time in the summer of 1937?

A. Well it must have been about November, whatever time that the completion was done.

Q. The fall of 1937? A. I don't remember.

Q. You are acquainted with Ernest Maehl?

A. Yes sir.

Q. When do you recall first having seen Mr. Maehl? A. In 1934.

Q. I was thinking about this job here?

(Testimony of Oscar Strickland.)

A. Oh, on the 24 of December 1936.

A. And did you have a conversation with him then at that time or about that time?

A. Oh just occasionally and it was on Christmas Eve and he had driven out to the job.

Q. State what was said in that conversation?

A. All I remember is that he said he was going back to work, he was feeling bad but he was able to go to work again.

Q. And did he go to work then?

A. He went to work a few days later.

Q. And how did he go to work, that is, what happened, what did he do?

A. He went out in the woods clearing.

Q. Was Mr. Metcalf there at that time?

A. Yes sir. [270]

Q. And do you know whether he and Mr. Metcalf worked on the same crew or not?

A. No they didn't.

Q. Well what happened?

A. Well Mr. Maehl took a small crew and went over in another part of the area to start work.

Q. And what did Mr. Metcalf do?

A. Mr. Metcalf kept on working where he was.

Q. With a crew? A. With a crew.

Q. And what if you know was Mr. Metcalf doing there, what was his job?

A. He was foreman.

Q. For whom?

A. Barnard-Curtiss Company.

(Testimony of Oscar Strickland.)

Q. And were you there then when Mr. Maehl took the contract to clear the 50 acres, the written contract? A. Yes sir.

Q. Did you have any conversation with him prior to the time that contract was taken, which had any reference to any of the work that he had been doing before, not with reference to that contract?

A. No I don't remember that.

Q. What happened then after Mr. Maehl went to work on that 50-acre tract; it is alleged in the answer and admitted in the reply, he cleared 24 acres —and is that right, do you know, is that about right?

A. That's about right.

Q. Did he clear a little more than that too?

A. Partially. [271]

Q. Well now what was the condition of that standing timber, that clearing, at the time when the 24 acres had been cleared and the other partially cleared, and Mr. Maehl had left—in some detail, Mr. Strickland?

A. Well there was a lot of timber cut down that wasn't cleaned up, it was very heavy, a lot of brush piled up, covered with snow; there wasn't enough of it cleaned up in proportion to what was down.

Q. And then what happened?

A. Just what do you mean?

Q. Well did Mr. Maehl go on with it, or what happened?

A. At what time? From when he went on until

(Testimony of Oscar Strickland.)

he got this 24 acres or thereabouts cleared up—you mean what happened then?

Q. Yes.

A. Well Mr. Barnard came back from Minneapolis.

Q. And that was Bob Barnard?

A. That was Bob Barnard; and after looking over the job and the cost, the progress, it looked pretty bad; the rest wasn't going to be done on time, the date agreed on, and also there was quite a fire hazard up in that country in the spring and they wanted to get it cleaned up, and at that rate, the way Mr. Maehl was going it wasn't possible to get it done.

Q. Have you seen a good deal of clearing done in your day, Mr. Strickland? A. Yes I have.

Q. On dams? A. Yes.

Q. Around Montana? [272] A. Yes.

Q. And what have you to say as to whether the methods used by Mr. Maehl were such as to carry out a contract of that kind on time and efficiently?

A. I don't think they were right.

Q. Now as to the dam site, was any work done on the clearing and grubbing of the dam site after you got there? A. Yes sir.

Q. And when was that?

A. That was in the spring, I can't remember the exact date, I would say possibly about April.

Q. And was Mr. Maehl there at that time?

A. No sir.

(Testimony of Oscar Strickland.)

Q. What did you have to do with that if anything?

A. I had to clean it all up in preparation for the foundation of the dam.

Q. When you say clean it all up, now, with particular reference to clearing and grubbing, state what you did in the spring of 1937?

A. Well the clearing was all done, that is, the trees were knocked down and most of the brush burned up, and it was partly grubbed, the small stuff that could be pulled with a team and small tractor was grubbed, but the big stumps were there and also the piles from these stumps that had been grubbed out, they were not burned.

Q. When was that done?

A. As I remember that started in about April.

Q. Of 1937? A. Of 1937.

Q. Was that, as I asked before, was that after Mr. Maehl [273] had gone? A. Yes.

Q. Was that done by Barnard-Curtiss Company?

A. Yes.

Mr. Toole: I think that's all.

Cross Examination

By Mr. Russell Smith:

Q. You have been working for Barnard-Curtiss for 20 years? A. Yes sir.

Q. And you came to this job on the 24 of December did you say? A. Yes sir.

(Testimony of Oscar Strickland.)

Q. Christmas Eve I believe? A. Yes sir.

Q. Was Bob Barnard there at the time you got there? A. Yes sir.

Q. And how long did he stay there?

A. About a week, as I remember, about a week, I don't remember the exact dates.

Q. What happened to him then?

A. He had to go to Minneapolis to have an operation.

Q. And about approximately how long was he gone? A. About two months.

Q. And who was in charge of that work up there while he was gone? A. I was.

Q. Was there any other officer of the company up there during that time?

A. Mr. J. A. Barnard was there oh, three or four times, he was in and out of there. [274]

Q. There was nobody resident on the job except yourself? A. That's all.

Q. When did you start putting dirt in the dam site?

A. I didn't start it, it was started the fall before I was there.

Q. That is, it was started some time prior to the 24 of December? A. Yes.

Q. And how much of that had been completed by the time you got there?

A. I can't say, possibly ten percent.

Q. And did that work of putting dirt in the dam-site go forward after you got there?

A. No sir.

(Testimony of Oscar Strickland.)

Q. When did they then do any work on the damsite after you got there, let's say up until the first of the year? A. No.

Q. And when did they recommence work on the damsite in putting dirt in it?

A. It must have been the latter part of June.

Mr. Smith: I think that's all.

Redirect Examination

By Mr. Toole:

Q. Did the grubbing that was done on the damsite in the spring delay the work of putting the dirt in the damsite? A. No sir.

Q. And while you said there was dirt put in the damsite in the fall there was none put in the area that you grubbed in the spring was there?

A. No. [275]

Q. Was it on the far side of the damsite or something like that?

A. No the dirt that was put in was down in the bottom; the clearing and grubbnig that was left was higher up on the hill on both sides.

Mr. Toole: That's all.

Recross Examination

By Mr. Smith:

Q. Did you have anything to do with these periodic estimates?

A. No sir, and more than I checked them over and they were sent to Minneapolis, sent to Mr. Barnard.

Mr. Smith: That's all.

Witness Excused.

Mr. Toole: I would like to call Mr. J. A. Barnard back for one question which I should have asked him on redirect examination, if your Honor please.

The Court: Very well.

And thereupon

J. A. BARNARD,

a witness for the defendant, was recalled and testified as follows:

Redirect Examination
(continued)

By Mr. Toole:

Q. Mr. Barnard in your cross examination, referring to these progress estimates, you were asked with respect to the various columns; you stated that the column containing the words "Detailed estimate" was not so very accurate, or words to that effect, did you not? A. That's right. [276]

Q. And that the column "Percentage of completion" was not very accurate? A. That's right.

Q. What have you to say to the accuracy of the column, "Price estimate," as to the accuracy of that column?

A. I think that would be fairly accurate—quite accurate.

Q. And why?

A. We would see to it that we got paid for what was due up to that date.

Q. That is what you were being paid on?

A. That's right.

(Testimony of J. A. Barnard.)

Q. And you checked the accuracy of that, did you? A. Yes sir.

Q. And the other columns were the estimates of the engineer's original plan as I understand?

A. That's right.

Mr. Toole: That's all I think.

Witness excused.

C. A. METCALF

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

By Mr. Toole:

Q. Your name is C. A. Metcalf? A. Yes sir.

Q. Where do you live? A. Philipsburg.

Q. How long have you lived there? [277]

A. About 50 years.

Q. Oh, you must have been born there. Are you acquainted with Mr. Maehl? A. I am.

Q. Did you go with Bob Barnard and Jim Barnard and Mr. Maehl up to the Flint Creek dam site some time in 1935? A. Yes sir.

Q. What was the purpose in going up there, Mr. Metcalf?

A. Well we went up to look at the timber, figuring on an estimate of what we could cut it for under a contract.

(Testimony of C. A. Metcalf.)

Q. And did you have a conversation at that time with J. A. or Jim Barnard? A. Yes sir.

Q. And was Mr. Maehl present? A. Yes sir.

Q. Will you state what that conversation was?

A. Well Mr. Jim Barnard talked to us about cutting the timber and wanted to know what kind of a contract we would be willing to take, how much we could cut that timber for.

Q. When you say we whom do you mean?

A. Mr. Maehl and I.

Q. Who was the conversation directed to, both of you or one of you or one at a time, or how was it?

A. I should say both of us.

Q. Now go ahead. Wanted to know how much you would take it for and how much you would cut it for? A. Yes sir.

Q. And what further was said?

A. Well we had talked it over before and then after we looked at it we decided we could cut it for $100.00 an acre. [278]

Q. And did you then at that time, you and Mr. Maehl, agree to take the contract for $100.00 an acre for that clearing?

A. Well the contract wasn't let; that was just an estimate we made, what we thought we could cut it for.

Q. When you said the contract wasn't let you mean Barnard and Curtiss didn't get the contract for the dam? A. Yes sir.

(Testimony of C. A. Metcalf.)

Q. And the contract was not let to Barnard and Curtiss Company, is that right?

A. Not at that time, no.

Q. And was anything further said up there particularly about a contract between you two and Mr. Barnard—the Barnard-Curtiss Company—on it, or was it just that conversation about as you stated?

A. Oh just a conversation with all four of us, so far as that goes, about the cutting of the timber there, what we thought we could cut it for, and things of that sort.

Q. Do you recall at any time Mr. Maehl stating that he would take the contract for $100.00 an acre—he personally? A. No not personally.

Q. And you came back then to Philipsburg after that, all four of you? A. Yes sir.

Q. But Barnard-Curtiss Company didn't get the job that summer, it went to Inland Construction Company as low bidder? A. Yes sir.

Q. And that fell through didn't it?

A. Yes sir.

Q. Subsequently did you have a conversation with Mr. Maehl about the work on the project or the clearing? Did you [279] talk with Mr. Maehl about it? A. After that?

Q. After that?

A. Yes we talked more or less about it, we were working together at the time.

Q. When is the first time you talked with Mr. Maehl after the conversation up at the dam site in 1935, about when?

(Testimony of C. A. Metcalf.)

A. Oh I don't know, we had several conversations about cutting it, we would cut it at $100.00.

Q. Yes if you had a conversation, if you remember? A. Oh I don't remember.

Q. Well did you have any more conversations with him at all?

A. Right at that same time, just after Mr. Barnard left, or anything like that?

Q. Well at any time?

A. Oh yes there were other conversations about it.

Q. Now tell me as nearly as you can when the first of those conversations occurred?

A. Between Maehl and I?

Q. Yes.

A. Well we had talked about it when the job was going to be let, of trying to get a contract on it.

Q. That was in 1936?

A. Well 1935 first, when they were advertising the job, we had talked about whoever got it, trying to get a contract if we could.

Q. That is when they were advertising it the second time?

A. The first time and also the second time too.

Q. Well but I was thinking about the conversation after [280] that, after you had been up and looked at it, did you talk with Mr. Maehl then?

A. Yes we talked at different times.

Q. And tell me what was said at those conversations?

(Testimony of C. A. Metcalf.)

A. Well I don't know, just kind of a general conversation about taking the contract there; I don't remember the exact words or just what it was; we talked at various times about it.

Q. Well would you have said, for instance——

Mr. Smith: Just a minute——

Q. (continuing): —would you have said "Maehl" —what do you call him, Ernest? A. Ernie.

Q. (continued): "Ernie, let's you and I go and get a contract from Barnard and Curtiss on this clearing?"

Mr. Smith: We object to that.

The Court: I don't know what the answer could be; I think you had better inquire what, if anything, was said between them on that subject.

Mr. Toole: Well I have a statement I want to make to the court in connection with this; I would just as soon make it in the presence of the jury, and I don't care about making a statement of the testimony, myself, before the jury; I want to demonstrate to the court that this is an unwilling witness, one whom I have a right to ask rather pointedly with respect to those conversations.

The Court: Well I expect it would be better to excuse the jury while you make that statement. And thereupon, being duly admonished by the court, the jury was excused and withdrew from the court room. [281]

Mr. Toole: What I had in mind was this, your Honor, as your Honor will recall there was a motion

(Testimony of C. A. Metcalf.)

filed to join Mr. Metcalf as a third party in this case. Mr. Maehl has testified that Mr. Metcalf was sent up there as a foreman while he was away; and I have here the pleadings signed by the witness wherein he alleges that he had a contract for this clearing and wherein he is suing Barnard-Curtiss Company in the state courts upon the same cause of action as that sued upon here, and I think it becomes material to both court and the jury to now find out, or permit me to ask this witness directly on the point as to whether or not he does have such a contract or at least what conversations were had between him and Barnard and Curtiss as would indicate some contract; I didn't want to ask those questions before the jury, but I think that it is clear that we couldn't expect Mr. Metcalf to testify as to the existence of a contract between himself—or, that is—of the existence of a partnership between himself and Maehl, which is inconsistent with the pleadings in the two cases which he has filed; and that is the reason for that request.

Mr. Smith: Of course it is our position, after all, the mere fact that this witness may have had a contract with Barnard-Curtiss on this same contract is not evidence that Maehl did not have a contract, and then of course we specifically object, not so much to the nature of the question asked, as to its materiality, and counsel has not yet shown sufficiently from this witness to warrant leading him, under the provisions of our Code.

(Testimony of C. A. Metcalf.)

Mr. Toole: Well I just wanted to show that this witness is an unwilling witness, by his pleadings in the other [282] case.

The Court: Well it is undoubtedly the rule that where a person is shown to be adverse the party examining him may ask leading questions; it would probably cause a state of mind on the part of the jury which would be adverse to the plaintiff—not the plaintiff here—on the showing that he is also suing for the same work. Well how about it, Mr. Metcalf, were you claiming for cutting the same timber that Mr. Maehl is claiming?

The Witness: Yes.

The Court: The same identical land or part of it?

The Witness: Most of it yes.

The Court: Most of it is the same?

The Witness: Yes.

The Court: What, if any effect, has that upon your mind, with reference to Maehl's claim?

The Witness: Nothing only just as I say it.

The Court: Well were you and he operating together at that time?

The Witness: I contend that I done all the operating, I done all the work; we had an agreement whereby we would do this work together, and I done all the work.

The Court: In other words your contention is that the agreement was between the defendant Barnard-Curtiss Company and you and Maehl?

The Witness: Originally, yes.

(Testimony of C. A. Metcalf.)

The Court: When was that contract made?

The Witness: Oh some time in 1936, the fall of 1936.

The Court: And your contention is that you did all the work? [283]

The Witness: Yes sir.

The Court: And now he wants half of the money?

The Witness: That's it exactly.

The Court: And your interest is adverse to his, then?

The Witness: He didn't live up to his agreement with me.

The Court: On the other hand he says the entire contract was with him and that you are not in it at all. I think, under that condition, it is fair to assume that the interest of this witness is adverse to the contention of both the plaintiff and the defendant in the case now on trial, and that he would be adverse, or would as a witness be adverse to the defendant in the case now on trial; and for that reason I will permit the defendant's counsel to lead and to treat the witness as one on cross examination. Call the jury.

Thereupon the jury was called into the court room and resumed their seats in the jury box.

Mr. Toole: Now if you will read the question.

Q. (read by reporter): Would you have said "Maehl"—what do you call him, Ernest?

A. Ernie.

(Testimony of C. A. Metcalf.)

Q. (continued): "Ernie, let's you and I go and get a contract from Barnard and Curtiss on this clearing?"

Q. Did you make some statement of that kind or a similar statement to Mr. Maehl after your conversation with him? A. I think so.

Q. And subsequently did you and Mr. Maehl, operating together, make any verbal agreement as between the two of [284] you, that you would have these clearing contracts together?

A. Under certain conditions, yes.

Q. And were you ever Mr. Maehl's foreman up there? A. No sir.

Q. State whether or not Mr. Maehl ever asked you to go up there as his foreman at the time he became ill? A. He never did.

Q. After Mr. Maehl left, when he became ill, did you go ahead with the clearing crew?

A. I went ahead at all times down there.

Q. And were you carried on Barnard and Curtiss' payroll?

A. That was under certain conditions of ours, certain agreements, Mr. Barnard and I.

Q. And you were paid weekly by—or whenever it was? A. Yes.

Q. Was it every two weeks?

A. Every week.

Q. By Barnard and Curtiss? A. Yes.

Q. How much—what was your rate of pay?

(Testimony of C. A. Metcalf.)

A. Six bits an hour.

Q. Seventy-five cents? A. Yes.

Q. And you drew that pay regularly from Barnard and Curtiss Company? A. Yes.

Q. And when Mr. Maehl returned on the 28 of December, 1936, did you talk with him?

A. Yes sir.

Q. State what was said? [285]

A. Well he came up on the job and I had seven or eight men cutting some small timbers that they could cut with axes on a kind of a flat, and I had the sawyers over some little distance from there, probably an eighth of a mile or such a matter, cutting heavy timber, and when I started the men in the morning, the sawyers, after while I walked over to where these other men were, and Mr. Maehl was there, and we told him that he hadn't been living up to any agreement he made, that this was my contract, and he informed me—I said "You got nothing to do with it," and I informed the men they were working for me and taking their orders from me and not from Mr. Maehl, which they said "All right," and they went ahead and took their orders from me.

Q. And did it continue that way until the 16 of January when he went over on the 50-acre tract?

A. Yes; well he said "I'm going to stay here until Jim Barnard comes;" I says, "I guess I can't put you out, that is up to you, but I never hired

(Testimony of C. A. Metcalf.)

you and I'm not paying you either," and we had considerable words about it.

Q. Did you state to Mr. Maehl at that time that you had a contract with Barnard-Curtiss Company for that clearing? A. I did.

Q. Have you sued Barnard-Curtiss Company on your contract also? A. I have.

Q. For the same area of clearing?

A. Practically the same, yes.

Q. And do you now claim that it was your contract and not Mr. Maehl's contract?

A. I do. [286]

Q. And do you now claim that whatever understanding, if any, that was originally made, was a contract made between you and Mr. Maehl jointly, as one party, and the Barnard-Curtiss as the other party?

Mr. Smith: We object to that on the ground that it calls for a conclusion of the witness.

The Court: Yes I think it does; what his claim may be is of no importance; you may draw from him any conversation he had with Maehl or with Barnard-Curtiss or any of their agents relating to employment of the two men or employment of him alone, that is, the witness alone, to do this work. The objection will be sustained.

Mr. Toole: Note an exception.

Q. Mr. Metcalf it has been stated that there was somewhere around seven acres of clearing and grubbing on the dam site? A. Yes sir.

(Testimony of C. A. Metcalf.)

Q. And perhaps 118, as stated by Mr. Maehl—107½, I think, was stated by Mr. Hensolt—tell us, did you have a measurement made of the area up there? A. I did.

Q. How many acres did you find on your measurement?

Mr. Smith: Now just a moment; we object to that; the measurement of what——

Mr. Toole: Well of the area that is referred to as the Maehl clearing.

A. How many acres—I don't have an estimate of all of it, no.

Q. What estimate did you have?

Mr. Smith: Again I object to that on the ground that any estimate he may have had would not be particularly [287] material unless we find out what area he was measuring.

Mr. Toole: He was Mr. Maehl's foreman.

The Court: Well the estimate he may have made if made by others would be merely hearsay.

Q. Well did you do any measuring up there or any estimating as to the acreage that you supervised the clearing on?

A. Personally you mean?

Q. Yes. A. Yes.

Q. What was the area, can you remember?

A. You mean the clearing and grubbing and——

Q. Just clearing. A. All of the clearing?

Q. Yes. A. My estimate was 108 acres.

Q. And how many acres of grubbing?

(Testimony of C. A. Metcalf.)

A. Oh about between nine and ten acres.

Q. And that was in the same area as the clearing? A. Yes sir.

Q. The grubbing as alleged in the complaint, the Maehl complaint, was 20 acres—he alleges 20 acres; he testified that he was not there during the winter but that you were, I think, his foreman; do you know of any 20 acres of grubbing up there within the area that Mr. Maehl referred to, or was that the 9½ acres you referred to?

A. Well that was some of it, the 9½.

Q. Was that all in the same area there?

A. That was in the dam site, the borrow pit, the 9½.

Q. The 9½ acres of grubbing was what you supervised, was it? A. Yes sir. [288]

Q. During the winter? A. Yes sir.

Q. While Mr. Maehl was away?

A. I don't know if he was away but he wasn't there when I done that grubbing, he was working on different jobs.

Q. When did you first go up there and start working on the clearing?

A. On the 7 of October.

Q. And how much time, from the time you went up there, how much time were you there until you finally left—how long were you there?

A. Oh I was there until the latter part of April —that is, on the job, you mean?

Q. Yes. A. On the Barnard-Curtiss job.

(Testimony of C. A. Metcalf.)

Q. And how much of that time were you supervising clearing in one capacity or another?

A. Most all the time, I guess all the time.

Q. And during that period I think you said October 24, did you say?

A. October 7 I started clearing.

Q. To April some time—what time in April?

A. I don't just remember; I quit along in April.

Q. Was Mr. Maehl there during that period of time, supervising the clearing or handling or clearing the tract or doing any clearing or managing the crews?

A. He was there from, oh, some time around the middle of January, until well, two or three months afterwards.

Q. Going back to October, do you recall what Mr. Maehl was doing when you went out there on October 7? [289] A. He was building a camp.

Q. Did you ever see him supervising any clearing or handling any clearing at that time?

A. No sir.

Q. Did you ever see him supervise or boss or handle any clearing from October 7 until January 28 when he came back from the hospital?

A. No sir.

Q. During the time from October 7 until December 28 when Mr. Maehl came back from the hospital did you supervise the clearing for him as his foreman? A. No sir.

(Testimony of C. A. Metcalf.)

Q. Did you see anybody else supervising clearing for Mr. Maehl as his foreman during that period?

A. No sir.

Q. From December 28 until January 16 did you see—or about the middle of January—was he out supervising any clearing?

A. Well he was out there but I was doing the supervising; I told the men that they were working for me and not for Maehl and they said all right.

Q. And during that period were you his foreman? A. No sir.

Q. And on January 18 he moved over on to the 50-acre tract, you know that, do you? Do you know about that? A. Yes.

Q. And from then on he went it alone under a written contract of his own, is that so?

A. Well I don't know.

Q. So far as you know?

A. So far as I know, yes. [290]

Mr. Toole: I believe that's all. That's all.

Cross Examination

By Mr. Smith:

Q. Your interest in this matter is definitely adverse to Mr. Maehl's interest?

Mr. Toole: To that we object as calling for a conclusion.

The Court: Yes I think it is.

Q. You at the present time have a claim against

(Testimony of C. A. Metcalf.)

Barnard-Curtiss Company involving some of this same work? A. I do.

Q. And they have denied your claim have they?

Mr. Toole: Just a minute; that is objected to——

Mr. Smith: Well your Honor——

The Court: I think that would have a bearing on plaintiff's rights, if they admit——

Mr. Toole: I want to say that isn't so, either—I mean that counsel offered that and didn't ask that the jury be excused before making that sttaement, as I did, and I think it should be clear, there are no denials in these files, he has sued Barnard-Curtiss and they haven't denied his claim, no answer has been filed.

The Court: Well a denial may be made without answer being filed.

Mr. Smith: I didn't ask him if he filed suit, I asked him if he claimed against them and they denied it.

The Court: Well the party against whom he made that claim, Barnard-Curtiss, denied his claim.

Mr. Toole: Well it is half true.

The Court: It might have a bearing on his claim [291] in this case, I think. Well I think we will sleep on it.

Whereupon at five o'clock p. m. of said day recess was had until ten o'clock the following day, when the trial was resumed, the court having duly admonished the jury.

(Testimony of C. A. Metcalf.)

Mr. Smith: I think when we closed last night there had been a question asked and an objection made and we had no ruling on it. I know what the question was; I will repeat it.

The Court: Very well we will start over with the question.

Q. You are the plaintiff are you not, Mr. Metcalf, as against Barnard-Curtiss, on a contract for clearing a portion of the area which has been designated here as the 118-acre area? A. I am.

Q. And you have filed suit against Barnard-Curtiss covering that claim have you not?

A. I have.

Q. And have Barnard-Curtiss denied that claim?

Mr. Toole: Just a minute; that is objected to as immaterial.

The Court: Overruled.

Mr. Smith: Will you answer please?

A. They have.

Mr. Smith: I think that's all.

Redirect Examination

By Mr. Toole:

Q. Well Mr. Metcalf you and your attorney were in my office the other day discussing adjustment of that claim? [292] A. Yes sir.

Mr. Smith: We object on the ground that an offer to compromise is not admissible.

The Court: Well, the answer will be stricken.

Mr. Toole: The question wasn't as to the matter

(Testimony of C. A. Metcalf.)

of compromise but simply in rebuttal or on cross examination on the denial of the claim.

The Court: You were having a conference on the settlement?

Mr. Toole: We were having a conference on the suit that Mr. Smith just referred to, the suit that Mr. Metcalf has against Barnard-Curtiss.

The Court: The objection will be sustained.

Mr. Toole: Mr. Metcalf, you were discussing—you and your attorney, in my office the other day, payment of your claim?

Mr. Smith: Objection on the same ground.

The Court: Objection will be sustained.

Mr. Toole: Note an exception.

The Court: Just a moment. In deciding this case, gentlemen, you will pay no attention to any question that is asked or any implication drawn from the testimony to which an objection has been sustained. I think you have gone far enough along that line. You have protected your record twice.

Mr. Toole: Mr. Metcalf, you said that Barnard and Curtiss had denied the claim. Is that really so when you say denied the claim?

A. It has never been settled at least.

Q. It has been discussed, however, recently?

[293]

A. Yes.

Q. You stated that the claim to which you referred was for a portion of the area cleared—when you say portion, what portion do you mean?

(Testimony of C. A. Metcalf.)

A. The portion that I claim.

Q. Yes? A. The reservoir site.

Q. Your claim is for 108 acres, is that so?

A. Of the reservoir site, yes sir.

Q. And if Mr. Maehl's claim is 118 acres, yours is for 108 of that 118, is that so? A. Yes sir.

Q. In fact your claim is for all of the acreage over which you or Maehl had supervision excepting the dam site and the 50 acre tract that he had, is that so?

A. I don't think I quite understand that question.

Q. You didn't claim anything against Barnard and Curtiss for clearing the dam site, did you?

A. No sir.

Q. But your claim is for all of the other acreage that either you or Maehl had any supervision over?

A. Well, later on I had supervision over on some other clearing.

Q. But your claim is for all of the acres except the dam site which was jointly supervised by you or Maehl or both of you, isn't that so?

A. Yes sir.

The Court: Any further questions?

Mr. Smith: That's all.

Witness excused. [294]

Mr. Toole: If your Honor please I stated yesterday that I might want to call Mr. J. A. Barnard back; I will call him back now.

The Court: Very well.

Thereupon

J. A. BARNARD

was recalled as a witness for defendant and testified as follows:

Redirect Examination

By Mr. Toole:

Q. Yesterday, Mr. Barnard, you testified concerning some $11,000.00, something more than that, that had been expended by Barnard-Curtiss Company in connection with the 50-acre written contract, is that so—you recall that, do you? A. Yes sir.

Q. Now with respect to the clearing and grubbing on the area referred to in the complaint, state whether or not Barnard-Curtiss Company, in addition to the $8360.30 which Mr. Maehl alleges in his complaint was expended by you, or paid to him as he says, Barnard-Curtiss Company had additional expenditures?

Mr. Smith: At this time, your Honor, we object to this question on the ground that the witness is refreshing his memory.

Mr. Toole: I was coming to that. They did have additional expenditures, did Barnard and Curtiss?

A. In addition to the money expended on the 50-acre contract?

(Testimony of J. A. Barnard.)

Q. Well in addition to the amount Mr. Maehl has said was [295] in payment of labor? A. Yes.

Q. Now you have in your hand a document or piece of paper, which is—is that the same paper from which you testified yesterday? A. Yes.

Q. Is that the paper upon which the compilations were made with respect to the expenditures on the 50-acre contract? A. Yes.

Q. In addition to those expenditures does it contain other compilations or figures? A. Yes.

Q. And do those other compilations or figures have reference to the amount of acreage referred to in the complaint? A. Partially, yes.

Q. And when you say partially, what do you mean by partially?

A. Well there is a compilation here of the dam site.

Q. Yes. Well, you recall Mr. Maehl's testimony that the dam and reservoir site were all in one?

A. Yes.

Q. Do you have figures on the sheet of paper which have reference to the dam site and the other acreage referred to by Mr. Maehl? A. Yes.

Q. And you recall that that was referred to as all in one by him? A. Yes. [296]

The Court: We will eliminate that. It is for the jury to say what Mr. Maehl said, not for you to interpret it and where it leads and it is improper form of examination, assuming that something exists or seeking as to whether a witness testified, the jury

(Testimony of J. A. Barnard.)

is the only body properly competent to judge along that line.

Mr. Toole: You have then on the memorandum figures referring to the clearing and grubbing on the area which is the dam site and the additional area except or outside of the 50 acres, have you?

A. Yes.

Q. Did you—or were those figures compiled by you from the same records—same group of records as you testified to yesterday? A. Yes sir.

Q. And those records were records that—were they kept in the usual course of business in your office? A. Yes sir.

Q. They are your regular books? A. Yes sir.

Q. And do you know that the figures on the sheet which you have are correct?

A. To the best of my knowledge they are correct.

Q. They were taken off of the books which your company regularly kept? A. Yes sir.

Q. And from the same books concerning which you gave testimony yesterday? A. Yes sir.

Q. Now state what the items of expenditures on the payrolls [297] were in addition to the men working on that clearing—that is on the clearing aside from the 50-acre area in the written contract.

Mr. Smith: At this time, your Honor, we object to any evidence of payment on behalf of Barnard-Curtiss for the reason that the pleading contains simply a general denial. Under the law of Montana payment is an affirmative defense which must be

(Testimony of J. A. Barnard.)

pleaded and there is no pleading of payment and therefore the question and proposed answer are incompetent, irrelevant and immaterial.

The Court: The principle is correct but does it apply here? Are you contending that there have been payments?

Mr. Toole: No your Honor, we denied that there was any such contract made.

The Court: You are confining this wholly to your second counter-claim?

Mr. Toole: No, this is on plaintiff's first cause of action. The plaintiff alleges in his first cause of action that——

The Court: That he received or there was paid on account $8360.30. You denied that there was any payment at all.

Mr. Toole: That's right. We denied the existence of any contract at all. It is a question of what was expended up there. That is what we are attempting to prove.

The Court: On account?

Mr. Toole: No.

The Court: On the other hand if it isn't intended for that purpose, it can have only one other purpose and that [298] is as to the credibility of the witness and that was covered definitely yesterday and will simply confuse the jury and now you expect to prove——

Mr. Toole: I want to state my purpose to the Court that under denial, where a contract is denied,

(Testimony of J. A. Barnard.)

under the rule of pleading where the contract is denied entirely, if plaintiff then comes into court and the Court permits plaintiff to make proof of a contract then under that general denial that such a contract was made the defendant has the right to show what was done by it and if the question of the making of the contract goes to the jury the defendant is not limited in proving what it did or what it paid out as a charge in performance of the work which defendant denies was the subject of a contract.

The Court: You have that right, yes. That is why I asked you whether this testimony was to contest the payment under the first cause of action set out in his complaint and you said no.

Mr. Toole: Maybe I didn't understand.

The Court: I may not have understood you but that was the theory. The complaint charges of course that there was an agreement under which the plaintiff was required to clear 118 acres and to grub a part of it at $100.00 an acre. Plaintiff then claims that he performed his part of the agreement and earned $11,800 upon which $8360.30 has been paid, leaving a balance of $3439.70 still due. Now as I understand it you want to show that he was paid more.

Mr. Toole: We denied that that contract was made. [299]

The Court: You denied making the payments too.

(Testimony of J. A. Barnard.)

Mr. Toole: That's right and we still deny that, but if the contract was made, your Honor——

The Court: If you wish to proceed upon that theory and prove that no payment was made upon the contract claimed in the first cause of action I think that would be proper.

Mr. Toole: Both the jury and the Court are entitled to know what——

The Court: Barnard and Curtiss have already testified that they have paid more than $11,000.00 in the performance of the contract. That was the testimony. You may produce that testimony in support of your second counter-claim. The first was dismissed. Now you are using the same.

Mr. Toole: That isn't correct your Honor. I am sorry to be in disagreement with the Court but the claim for 118 acres is way off on one side and the claim for the 50 acres is off on the other. The $8360.30 set up in the complaint is no part of the money that was testified to yesterday at all, not at all. It is an entirely separate and distinct proposition.

The Court: I understand that.

Mr. Toole: The plaintiff's complaint alleges the existence of a contract to clear 118 acres and the answer alleges a contract to clear 50 acres which are not any part of the 118 acres at all.

The Court: I understand that clearly. One is under a written agreement admitted by all parties; the

(Testimony of J. A. Barnard.)

other is under an oral. Are you trying to use the same [300] money twice in your proof?

Mr. Toole: Oh no, absolutely not.

Mr. Smith: I think your Honor, that it is clear that they are probably not trying to use this money twice but my position is this, that first of all under the pleadings in the first cause of action defendant denies that any contract was made and that a pleading binds a party and that he cannot by the introduction of evidence change that pleading. The second proposition is that where a payment is sought to be proved it must be set forth as an affirmative defense. Now then, there is no pleading of any payment in response to plaintiff's first cause of action. There is a denial. Now the defendant here cannot and even with other money put in issue a plea of payment which is not supported by any pleading in the allegation.

The Court: Payment is an affirmative defense which must be proved. I think I see just what counsel is trying to accomplish. It may have a bearing upon the testimony that Mr. Maehl was paid $8360.30. They deny that and do not allege payment but it might have a bearing upon the credit of the witness and the plaintiff alleges that there is $3439.70 due. That is denied. If they show that they in fact did pay more than $8360.00 on that 118 acre contract it is merely showing facts contrary to the proof of the plaintiff. So we will let the evidence in.

(Testimony of J. A. Barnard.)

Mr. Smith: May it be understood that our objection goes to the whole of this testimony.

The Court: To all of the payments made except as to the payment said to have been made under the agreement set out in the further defense and second counter-claim stated in [301] the answer on file herein. That's what you wish, I take it.

Mr. Toole: Mr. Barnard, what was the payroll or the amount of money paid for labor by Barnard-Curtiss Company on that 118 acres?

A. Payroll?

Q. Payroll on that acreage?

A. Payroll only?

The Court: Well, let's see here,—the acreage,—we have here apparently three or four separate contracts. The plaintiff Maehl contends three separate tracts, the dam site, the dam and the borrow pit, 7.88 and 28 acres included in the 118. Then we have here another tract of land, 50 acres, separate and apart from that 118 so for the purpose of certainty confine the question to the payments made upon the tracts, the 118, the 50 acre tracts and the tract not included in either of those for which Mr. Metcalf makes claim.

Mr. Toole: I wouldn't like to have it understood that I think the tract contained 118 acres. I believe the proof really is that it was 107 or 108.

The Court: Then on your objection the Court struck from the testimony certain added land which

(Testimony of J. A. Barnard.)

he said had been measured by others. I think there is no confusion on that point.

Mr. Toole: Do you know how much the acreage was in that area that is in controversy, including the dam site,—perhaps it is hearsay?

A. I don't know from my own knowledge.

Q. Now take,—as the Court has said,—there are three tracts of land,—there is a tract of land on the dam site, [302] there is a tract of land which Mr. Maehl claims he had a verbal contract for and there was a tract of land of 50 acres for which he had a written contract. Leaving the written contract and that 50 acres out of consideration entirely and taking the area outside of the dam site, not including the dam site, state what the labor expended by Barnard-Curtiss was on that item.

A. Not including the dam site?

Q. Not including the dam site.

A. $8322.57.

Q. What was the social security on that?

A. $324.33. That's correct. That was compensation insurance I just gave you.

Q. Compensation insurance?

A. The social security was $122.63.

Q. And was that paid by Barnard-Curtiss Company? A. Yes sir.

Q. Now after Mr. Maehl had left the camp or was gone did you expend any further money on that? A. We did.

Q. And what was that spent for?

(Testimony of J. A. Barnard.)

A. Cleaning up the job, finishing it.

Q. For labor?

A. Both labor and equipment.

Q. How much was that?

A. All that we have track of here which is not the entire amount, but all that we could,—was $126.10 plus the social security.

Q. How much was the social security?

A. $5.06. [303]

Q. And the compensation insurance?

A. $3.78. No, that's wrong again, the compensation insurance is $5.06 and the social security $3.78.

Q. And did you furnish also as required by your contract with the Water Board a labor bond on that?

A. Yes sir.

Q. And what was the premium?

A. $83.22.

Q. What expense in addition did you have on that with respect for instance to equipment?

A. We furnished or used our equipment up there in cleaning off the,—grubbing the stumps to the extent of,—do you want the amount?

Q. And what was that equipment?

A. Caterpillar tractors and,—principally caterpillar tractors, bulldozers.

Q. And what,—did you carry on your books then a value as to the use of the equipment for that period? A. Yes sir.

Q. What was it? A. $322.41.

(Testimony of J. A. Barnard.)

Q. Did you,—well,—just drop that for the moment. I don't suppose you have a note of those particular items there? A. No.

Q. Now with reference to the dam site, did Barnard and Curtiss Company expend labor or pay the labor on the dam site? A. They did.

Q. How much did you pay on the dam site?

A. $483.50.

Q. $483.50? [304]

A. Yes sir.

Q. Did you have any social security on that?

A. Yes sir.

Q. How much? A. $9.06.

Q. And compensation and liability insurance?

A. $29.31.

Q. Did you have any clean-up work on that later? A. Yes sir.

Q. You gave me $483.50 as the labor charge?

A. Yes sir.

Q. Did you have a subsequent labor charge in the clean-up work on that? A. Yes sir.

Q. How much? A. $141.15.

Q. Do you remember when that was?

A. I think it was in June, next year, or just prior to it.

Q. What other charges or items of expense did you have and did you have a social security on that item as well?

A. I presume it is included in the other.

(Testimony of J. A. Barnard.)

Q. And what is the next item there on your memorandum? A. Caterpillar use.

Q. Did you use a caterpillar or a bulldozer on the dam site? A. Yes sir.

Q. And when would that have been?

A. In the early summer of the next year, same date I mentioned.

Q. Long after Mr. Maehl was gone? [305]

A. Yes sir.

Q. How much for caterpillar? A. $80.00.

Q. $80.00? A. Yes sir.

Q. What is the next item?

A. Item of tools here of $10.00.

Q. I think we won't take that for the moment. What else? A. Labor bond.

Q. What was your labor bond? A. $7.66.

Q. $7.66? A. Yes sir.

Q. And what was your next item?

A. Supervision $6.24.

Q. $6.24? A. Yes sir.

Q. Now if Mr. Boone's contention is correct,—going back now to the 118 acres, the items which you gave me total $9322.10. Would that be the sum and total, if his addition is correct, of the amount expended by Barnard and Curtiss for the items which you have enumerated

A. I think we have missed one.

Q. What is that? A. Team labor.

Q. What did you do, hire some teams,—and how much was that? A. $107.43.

(Testimony of J. A. Barnard.)

Q. To the team owner?

A. It hasn't been paid. [306]

Q. Whose teams were that?

A. Mr. Metcalf's.

Q. Barnard and Curtiss owes that amount to Mr. Metcalf? How much? A. $107.43.

Q. That totals $9429.53, and if that total is correct is that the amount expended by Barnard and Curtiss on the 118 acre tract exclusive of your office and your general overhead?

A. I don't think it was all of it, it was all we could dig up.

Q. Now coming back to the item on the dam side, the addition there appears to be $756.92. Would that be the total amount expended by Barnard and Curtiss for the items on the dam site?

A. Apparently that is approximately it.

Q. The total of those two is $10,186.45. Is that the total amount then expended on the dam site and the 118 acre tract?

A. I haven't added it up.

Q. If that addition is correct, it is that amount?

A. Yes sir.

Q. You have some reference on that sheet to tools, Mr. Barnard,—did Barnard and Curtiss buy the tools that were used on the clearing on the 118 acre and the dam site tracts?

A. Any that is noted on the sheet here, they did.

Q. And state what,—you have the hardware company's bills there,—see if you can dig them out.

(Testimony of J. A. Barnard.)

Now take the sheet first and tell us how much was expended by Barnard and Curtiss Company for tools furnished for the clearing on the 118-acre [307] tract? A. $302.63.

Q. $302.63? What kind of tools were they?

A. I don't think the $302.63 insofar as the tools go, that is axes, saws, tools related to clearing work.

Q. Do you have all of the bills?

A. I think I have.

Mr. Toole: Does counsel want to examine the bills?

Mr. Smith: I don't want to examine those bills but I just want to know how he knows whether the bills relate to tools.

Q. I will ask you, Mr. Barnard, if the little yellow slips there are signed by either Maehl or Metcalf?

A. I think for the most part they are. I think there may be some missing.

Q. I will ask you if the total of the bills is larger than $302.63? A. Oh yes.

Q. And if you have selected only those tools which were sent up to those two jobs and most of which were purchased on slips signed by Maehl or Metcalf? A. That is right.

Q. And those amount to $302.00?

A. Yes sir.

Q. Is that on both the dam site and the 118 acres, so-called?

(Testimony of J. A. Barnard.)

A. Yes, excepting for a $10.00 charge we made on the dam site which isn't included.

Q. There should be an additional $10.00 charge . . . Let's add that. That would make $312.63 for tools? [308]

A. That's right.

Q. Mr. Smith says he thinks you have added that in once?

A. There is a $10.00 charge for tools that is allocated to the dam site on this statement which isn't in the $302.00.

Q. It is in one of the other figures which you gave me? A. Yes.

Q. That will be $302.63 as it originally was. Now this,—you may have testified to this before but I want to ask you now, do you happen to know when the clearing or grubbing, or about when the clearing and grubbing on the dam site was finished, of your own knowledge?

A. Last of May or first of June, 1936.

Q. And at that time was Mr. Maehl there at all?

A. No.

Q. Did you mean 1937 or 1936, you said 1936.

A. 1936, yes, second year.

Q. Maybe I have that wrong.

The Court: He said it twice, it stands.

Q. Well I would like to ask,—I think the witness is plainly mistaken.

The Court: He states twice under oath that it was 1936.

(Testimony of J. A. Barnard.)

Q. Mr. Barnard, when did you get this contract? A. 1936.

Q. In 1936. At what time did you get the contract? A. About August.

Q. August of 1936? A. Yes sir.

Q. Did you have a contract for the Phillipsburg dam in June of 1936? A. No sir. [309]

Q. Did you have a contract for the construction of the dam in 1937? A. Yes sir.

Q. And when was the contract completed?

A. That fall, in December.

Q. Of 1937? A. Yes sir.

Q. When was Mr. Maehl last up there, do you know? A. I think in March.

Q. Of what year,—now be careful.

A. 1937.

Mr. Toole: That's all.

Recross Examination

By Mr. Smith:

Q. I hope, Mr. Barnard, you have been as correct about all these figures as you were about the time Mr. Maehl was at the dam site. I have here, Mr. Barnard, the payroll sheets numbers 30 to 39 inclusive. I will ask you to look at the tabulations on the back of those sheets and ask you if it doesn't appear on each of them "Re Maehl contract No. 2"?

A. There is that on there, yes.

Q. Do you know without looking whether it appears on the sheets from 30 to 39?

(Testimony of J. A. Barnard.)

A. No, I wouldn't know without looking.

Q. Will you look, please?

Mr. Toole: Counsel ought to introduce the payroll.

The Court: I don't think that it is needed.

A. You want me to look through each and every one?

Q. Yes. [310]

A. (Witness does so)

Q. These payrolls, Mr. Barnard, were prepared under your supervision, were they?

A. Yes sir.

Q. And likewise the recap and summary which appear on the back of them were prepared by some employee of yours? A. Yes.

Q. What does the designation, Maehl contract No. 2 or Maehl No. 2 clearing, mean as it appears on each of those sheets?

Mr. Toole: I think, your Honor, if you please I want to state in advance I object to the question on the ground that the payroll speaks for itself.

The Court: Overruled.

Mr. Toole: Note an exception.

A. Maehl No. 2 contract has to do with the labor and expense of doing the work on the Maehl 50-acre tract.

Q. In other words do you mean that the contract on the 50-acre tract was Maehl contract No. 2?

A. That was part of it, yes.

(Testimony of J. A. Barnard.)

Q. And can you tell us how the designation Maehl contract No. 2 came to be applied?

A. I think it was when we took an active part up there in the supervision of that.

Q. You mean that when Maehl was proceeding under the written contract, would that be designated as Maehl contract No. 1?

A. The written contract,—I don't have that separated in my mind.

Q. Well now, I am not clear. It seems to me that my [311] recollection of what you just said is that Maehl contract No. 2 refers to the time that you took over the supervision.

A. Yes, that's right.

Q. Would Maehl contract No. 1 refer to the portion of the time on this written contract that Mr. Maehl was doing the work himself?

A. Yes, I think it would.

Q. In other words this definitely signifies,——

A. Yes, that will signify on the books from that time on.

Q. So that Maehl contract No. 1 would be the written contract up until the time you took the job over, is that right?

A. I don't know whether that would correctly describe it or not. It is a separation of the account up until the time we went,——

Q. It is a separation of the account?

A. It is a separation of the account.

(Testimony of J. A. Barnard.)

Q. What is this designation No. 2? It designates the contract after you started work?

A. After we took supervision of it, yes.

Q. Maehl No. 1 would refer to the written contract, now, before you started your supervision?

A. We definitely separated the job at the time we went in and took supervision, yes.

Q. And I will ask you if in any of the other books and papers prepared under your supervision, there is anything with respect to Maehl contract No. 1 which covers the period up until the time you took supervision?

A. I am not clear on that question.

Q. Do you have anything in your books which would show [312] that the written contract up until the time you took supervision as contract No. 1?

A. Well, yes. It is entered on the books as you see it here. That is a book entry.

Q. From the payrolls, beginning from the recapitulation sheet on the payrolls beginning March 14, the term Maehl contract No. 2 appears,—now that apparently was the time you took the contract over was it not, approximately March 14?

A. That's the time this separation on the payroll is made.

Q. So you designate that period as contract No. 2. Now then, do you have anything in your books that shows a similar designation for the first part of the performance under the Maehl contract?

A. I would have to look and see.

(Testimony of J. A. Barnard.)

Q. I won't ask you to look now. Will you look during the next recess?

The Court: Let's take the recess now.

Whereupon at 10:50 a. m. the jury was admonished and court was adjourned until 11:05 a. m. at which time the trial was resumed.

Q. Now if you designate the period from the time that you took the written contract on the 50 acres over as contract No. 2, do you have anything on your books that shows a designation of the time, —of the period from the time that Maehl first started on the performance of the 50 acre contract to the time that you took it over as contract No. 1? [313]

A. Yes sir.

Q. Will you show me where that is?

A. You want No. 1?

Q. Now what period does contract No. 1 cover and what work being done by Maehl does it contemplate? A. From this sheet?

Q. Yes.

A. The entries here up to March 31 on this,——

Q. March 31, what year? A. 1937.

Q. And when do they commence?

A. January.

Q. January, what day?

A. The ledger date is January 31.

Q. So that the period that Maehl was performing the contract as to the 50 acres is from January

(Testimony of J. A. Barnard.)

to March, 1937, as to contract No. 1. Is that right?

A. On the 50 acres, yes.

Q. And the period after you took it over, that is contract No. 2?

A. That is also the 50 acres.

Q. But designated as contract No. 2?

A. Yes sir.

Q. Now, first where are those hardware bills that you had? May I read to the jury to save putting in the record one of the notations appearing on this,——

Mr. Toole: Is that for the period designated as contract No. 2 in the books?

Mr. Smith: —and is from the recapitulation attached to that. I am going to read to the jury from payroll for [314] the period March 14, 1937 to March 20, 1937, and particularly from the distribution of the payroll sheet attached to the back of it. (Reading): "Re Maehl contract No. 2. We are keeping separate account of this contract even though the company has taken over the clearing of Maehl acreage. This is done to find a basis of comparative costs as well as keep the portion allotted to Mr. Maehl under one heading." These hardware bills are the bills that you used in making up your summary as to those costs, are they?

A. Yes sir.

Q. And in segregating the items which you have charged to the Maehl clearing, did you go through the whole list and take all of the slips signed by

(Testimony of J. A. Barnard.)

Maehl and all of the slips signed by Metcalf and use those items in your totals?

A. I didn't do it myself.

Q. As a matter of fact, Mr. Maehl at one time during the progress of the work on the East Fork, was working on the camp, was he not?

A. Yes sir.

Q. And likewise Mr. Metcalf at one time during the progress on the work, was working on what we might call a Barnard-Curtiss crew, was he not?

A. Yes sir.

Q. Now do you have any way of knowing whether your bookkeepers or whoever segregated these accounts, eliminated from the totals which you gave us, the tools which may have been bought by Maehl or Metcalf while Maehl was working on the camp and while Metcalf was working on the Barnard-Curtiss crew? A. They no doubt can.

[315]

Q. Now I am asking you if you know whether they did make that segregation?

A. Yes, they were directed to make that.

Q. Do you know whether they did or not?

A. I was sure that they did.

Q. You were sure that they did. Did you check it yourself? A. To some extent.

Q. From your own checking can you say that the tools Maehl may have bought while on the camp and the tools Metcalf may have signed for on the

(Testimony of J. A. Barnard.)

Barnard-Curtiss clearing were not included in this total? A. Were not included?

Q. Yes, can you say that from your own knowledge? A. To the best of my knowledge.

Q. Can you say that to your own knowledge, do you actually know that that is true?

A. Yes, I checked the accounts myself. Unless I made a mistake they are correct.

Q. In other words, the total that you gave us is a product of your own checking and computation?

A. Yes. I didn't make the entries, but I checked them.

Q. You checked the bills properly allocated to the 118 acre job? A. Yes sir.

Q. In preparing your summary sheet from which you gave us the various figures as to the amounts paid out by Barnard-Curtiss you relied, did you not, on the work of your bookkeeper?

A. Yes sir. [316]

Q. You yourself were not present at the dam construction all of the time?

A. Not all of the time.

Q. What proportion of your time would you say that you were present?

A. Well I was there a great deal, gone a few days at a time and back again. I was there most of the time.

Q. Well, you weren't there from January 18 until some time after March, were you?

A. I was there only once.

Q. And how long did you stay?

(Testimony of J. A. Barnard.)

A. Couple or three days.

Q. And during the progress prior to January 1, you were gone some portion of the time?

A. Yes sir.

Q. In making this summary sheet, you didn't make it yourself, you had some bookkeeper do it?

A. Yes sir.

Q. What bookkeeper?

A. Well, the timekeeper and bookkeeper, Mr. Pollock, Mr. Martin.

Q. And they are not present in Missoula?

A. No sir.

Q. In making the ledger, that's this book, the bookkeeper who made those entries relied upon the distribution of work made by the various timekeepers? A. Yes sir.

Q. Would the bookkeeper who made the entries have any independent knowledge of his own as to whether the time of any particular man,—— [317]

Mr. Toole: That is objected to as calling for a conclusion and asking the witness to testify as to the,——

The Court: Sustained.

Mr. Smith: My purpose in this was that the witness has testified that this was made under his supervision on that basis the books and the summary sheets were introduced. Of course if he had supervision I assumed that he would know how it was prepared.

The Court: That isn't the question. It was whether the bookkeeper knew.

(Testimony of J. A. Barnard.)

Mr. Smith: The original first record that is made of any time would be kept in the time books, would it not? A. Yes sir.

Q. And anybody taking figures from those time books would have to assume in the first instance that the timekeepers had properly allocated it.

Mr. Toole: Same objection.

The Court: It is overruled.

Mr. Smith: The time to the various jobs.

A. That's the practice, yes.

Q. And that would be true likewise, would it not, to social security, compensation, tools and all of the various things?

A. Yes, the percentage.

Q. That would be likewise true as to the use of equipment, these caterpillars and that sort of thing on various jobs? A. No.

Q. What would the situation be with respect to that?

A. Well, the superintendent generally handles that.

Q. Who? [318]

A. He would direct the bookkeeper.

Q. Now then, if the ledger book is made up and the bookkeeper starts work on the summary which you have made he takes the entries,—he must necessarily take the entries in the ledger as being correct, must he not? A. The bookkeeper?

Q. Yes, the bookkeeper who made the summaries. A. Yes.

(Testimony of J. A. Barnard.)

Q. Now if you will refer to the time sheets involved in the,—what has been designated as Maehl contract No. 1 and run the figures through I think you will find that an error of some $20. in addition was made. Now we took the items from the contract and added them on an adding machine. I wish you would check,——

Mr. Toole: Now Mr. Barnard the witness has a right of course to take the payrolls and go through them.

Q. If you care to, I will read those to you and you can check the adding machine slips, $430.20.

Mr. Toole: Show him the first payroll, let him,——

The Witness: I would like to say, the payroll may not be in check with the distribution sheet.

Q. Well where were the figures that appear on this paper taken from?

A. They apparently were taken from the ledger and that would show that they were off of the distribution sheet.

Q. In other words, there may be a discrepancy in the amounts appearing on the payroll and the distribution sheets. A. Yes, there might be.

Q. And these, this summary represents the work taken [319] from the distribution sheets?

A. Yes sir.

Q. Well let's go through this now, you go through it, Mr. Toole doesn't want me to have anything to do with this.

(Testimony of J. A. Barnard.)

A. The tape apparently checks with the distribution.

Q. I will ask you to compare the total figure with the figure on your summary sheet.

A. Which one is that?

Q. Well the same sheet.

A. It is $4301.30 and this is $4281.30.

Q. Difference of $20.00? A. Apparently.

Q. Now, I show you one of the hardware slips from which you made your summary as to tools, the first yellow sheet there, and at the bottom of that I see an item marked charge Maehl. Do you know whose handwriting that is?

A. No, I don't know.

Q. Those records have been in your possession ever since they first came? A. Yes sir.

Q. Do you know the handwriting of your various bookkeepers and superintendents?

A. I don't recognize that signature and I generally do recognize their handwriting, yes.

Q. The bill itself is in carbon, is it not?

A. Yes sir.

Q. And the words "charge Maehl" as they appear thereon are in pencil? A. Yes sir. [320]

Q. The date that that bears is September 1, 1936? A. Yes sir.

Mr. Smith: Will you mark that please?

Juror: When did you say that date was, the date there that you just mentioned, what date?

The Witness: On the slip, September 1.

(Testimony of J. A. Barnard.)

Juror: September 1, pardon me, I thought you said December 1.

Mr. Smith: We offer in evidence plaintiff's exhibit No. 14.

Mr. Toole: May I see the exhibit?

Mr. Smith: Just that one sheet.

Mr. Toole: May I see your other exhibits, Mr. Smith. Can you tell here that sheet bears the signature of Ernest Maehl?

The Witness: Looks like it.

Mr. Toole: We have no objection.

Whereupon was received in evidence without objection and read to the jury the instrument referred to, marked as Plaintiff's Exhibit 14, and being as follows:

PLAINTIFF'S EXHIBIT 14

Phone 13 Phone 13

Philipsburg Hardware Co.

Shelf and Heavy Hardware

Mine Supplies Sporting Goods

Philipsburg, Mont., Sept. 1, 1936.

M	Barnard & Curtiss	Dam Site	
	3	Plumb axes	8.10
	1	Vulcan axe	3.00
	1	Saw Handle	.40
	2	hammer handles	1.10
			12.60

ERNEST MAEHL

13 Chg. Maehl [321]

(Testimony of J. A. Barnard.)

The Court: Which sheet do you refer to?

Mr. Smith: Which signature are you talking about?

Mr. Toole: Talking about this right down here.

Mr. Smith: Ernest Maehl?

Mr. Toole: Ernest Maehl.

Mr. Smith: When you say this sheet bears the signature of Ernest Maehl, you are referring to the carbon and not to the pencil?

A. That is right.

Q. We offer,—this has been offered without objection.

The Court: If there are no objections, read it to the jury.

Mr. Smith: I will give you this, gentlemen. The only part of it introduced is the yellow slip bearing the number,——

Mr. Toole: Well, let's take it off.

Mr. Smith: That's fine. There are a lot of statements there. I show you another slip from the Philipsburg Hardware Company.

A. Yes sir.

Q. That is likewise one of the slips from which you took your summary? A. That is right.

Q. And it likewise is in carbon?

A. Same thing.

Q. And likewise the notation charge Maehl appears in pencil? A. Same thing.

Q. And it bears date 9-11-36?

A. September 11, yes. [322]

(Testimony of J. A. Barnard.)

Mr. Smith: We offer in evidence,——

Mr. Toole: Let me see it, please. Are you able to identify that as Mr. Maehl's signature on that?

A. Yes, it is the same signature as on the other one.

Mr. Smith: And again, the handwriting,—when you say it is Maehl's signature you are referring to the carbon. And the pencil "chaege Maehl" does that appear to be the same as the other?

A. Appears to be the same, yes.

Mr. Smith: We offer in evidence plaintiff's exhibit 15. It is much the same as the other one.

Mr. Toole: No objection.

Whereupon without objection was received in evidence the instrument which is identified as and marked Plaintiff's Exhibit 15, and the same being as follows:

PLAINTIFF'S EXHIBIT 15

Phone 13 Phone 13

Philipsburg Hardware Co.

Shelf and Heavy Hardware — Mine Supplies Sporting Goods

Philipsburg, Mont, 9-11-1936

Mr Barnard Curtiss Co

400 " fuse	4.00
200 Caps	4.00
15—2 Cloth	50

Dam Job

E. MAEHL

Chg Maehl

(Testimony of J. A. Barnard.)

Mr. Smith: I will show you plaintiff's proposed exhibit 16. It appears to be the same sort of slip from the same source. The signature of Mr. Maehl appears to be the same and the handwriting charge Maehl is the same. This date appears to be 9——

A. Yes sir.

Mr. Smith: We offer in evidence plaintiff's exhibit No. 16.

Mr. Toole: No objection.

The Court: It will be admitted and considered read into the record.

Whereupon without objection was admitted in evidence, considered as read, the instrument referred to, identified as and marked Plaintiff's Exhibit 16, and being as follows:

PLAINTIFF'S EXHIBIT 16

Phone 13 Phone 13

Philipsburg Hardware Co.

Shelf and Heavy Hardware — Mine Supplies Sporting Goods

Philipsburg, Mont. 9-2 1936

M Barnard Curtiss Co

200 # 2090 Powdr	1.75
300 Cap	6.00
400 " fuse	4.00
	7.50

Dam Sight

ERNEST MAEHL

31 Chg. Maehl [324]

(Testimony of J. A. Barnard.)

Mr. Smith: I think we have nothing further.

Redirect Examination

By Mr. Toole:

Q. Did Mr. Maehl ever pay Barnard and Curtiss Company for the items on those slips?

A. As far as I know, not.

Q. Did Barnard-Curtiss pay Philipsburg Hardware for them? A. Yes sir.

Q. And are those the same items as are charged back against Mr. Maehl on his 50 acre contract?

A. 50 acre contract?

Q. Or dam site, I should say.

A. Yes sir.

Mr. Toole: That's all,—wait a minute. I will ask you with respect to these contracts 1 and 2, do you know how they happen to be designated as contracts 1 and 2, Mr. Barnard? A. Yes.

Q. I will just hand you that. That was read to the jury, that paragraph down there.

A. At the time that this notation was made,——

Q. And when would that have been?

A. Between March 4 and 20, evidently on March 20. It was in order that,—we were keeping a separate account of this contract even though the company had taken it over. It was done to find a basis of comparative cost, so as to keep the portion allotted under one heading at that time. The balance of the work done after that date was noted as contract No. 2.

(Testimony of J. A. Barnard.)

Q. Was that the work that was carried on by Barnard- [325] Curtiss in completion of the 50 acre tract? A. That is right.

Q. And how, if you know, that contract No. 1 was entered then in the ledger?

A. Well in order to keep them apart and be able to recognize them I think the bookkeeper numbered the earlier one No. 1.

Q. Take the ledger, Mr. Barnard. There appears to be a ledger account, contract No. 1. It says here Maehl clearing contract No. 1. A. Yes.

Q. The entries on that,—in that are between January 31, did you say,——

A. Well, the ledger entry would be made at the end of the month and that would be January 31.

Q. To what time? A. March 31.

Q. And was that while Maehl was himself up there clearing the 50-acre tract? A. Yes sir.

Q. On a separate page some place there is Maehl No. 2. Why would those pages be separated. Do you know why?

A. To be able to tell what the costs were between those times.

Q. Well, more specifically now, why was it done?

A. Well, it is explained on the payroll sheet.

Q. I want to ask this witness a leading question, if I may.

The Court: He says it is explained on the recapitulation. I will request that he read the explanation.

(Testimony of J. A. Barnard.)

The Witness: (Reading) We are keeping separate ac- [326] count of this contract even though the company has taken over the clearing of Maehl acreage. This is done to find a basis of comparative costs as well as keep the portion allotted to Mr. Maehl under one heading.

Mr. Toole: That reference then, is to the last half of the Maehl 50-acre contract?

A. Yes sir.

Mr. Toole: I think that's all. You did find $20.00 difference in your addition there, did you?

A. As far as we went we did.

Q. You didn't go through all of the other payrolls to see if some item may have been put in there in some other payroll?

A. I didn't discover any difference on the tape so far.

Mr. Toole: I think that is all.

Mr. Smith: Just a moment please, I have one question which I should perhaps have asked on cross examination.

Recross Examination

By Mr. Russell Smith:

Q. This summary sheet from which you have testified, Mr. Barnard, was prepared when?

A. It was prepared about the time we finished the job,—you mean this?

Q. That particular sheet. A. Yes.

Q. That is the only sheet you have, is it not,

(Testimony of J. A. Barnard.)

showing any comprehensive set-up of the costs on the Maehl contract?

A. Well, we have had,—we have done a lot of work on it and this is the sheet that we have finally adopted as being correct. [327]

Q. What I am getting at,——

A. We may have a copy of this in addition to this sheet.

Q. Well this sheet, or copy of this sheet,—that is the only place where this information all appears in one comprehensive way? A. I think it is.

Q. And that wasn't done until sometime in June, would it be?

A. Completed probably after that.

Q. After that? You said at about the time of the completion of the job. A. November.

Q. So that that was made in November?

A. I couldn't say November, between completion and November.

Q. Now was that made after the institution of this law suit?

A. I have forgotten when the law suit was first instituted.

The Court: April 14, 1938.

Q. Do you know whether it was made for the purpose of the lawsuit?

A. I couldn't answer that question. No, I don't know.

Mr. Smith: I think that's all.

(Testimony of J. A. Barnard.)

Redirect Examination

By Mr. Toole:

Q. Mr. Barnard, was it made after any demand had been made on you by either Maehl or Metcalf?

A. I think it was.

Q. Why did you make that? [328]

A. Well, we made it to find out where the accounts stood.

Q. What accounts?

A. The accounts of Maehl.

Q. And did Metcalf,—had Metcalf made any demand on you at the time? A. Yes he had.

Q. And that includes the area for which Metcalf claimed a contract also? A. Yes.

Mr. Toole: I think that's all.

Recross Examination

By Mr. Smith:

Q. You didn't up until the time that was made actually know where you stood? A. Yes.

Redirect Examination

By Mr. Toole:

Q. Did you know where Maehl stood on the 50 acre contract? A. On the 50 acres?

Q. When did you find that out?

A. On the completed job?

Q. No, at the time when Maehl left and when you went in and finished.

A. We knew where he stood.

(Testimony of J. A. Barnard.)

Q. Where did he stand?

A. Approximately $2500.00 in the red.

Recross Examination

By Mr. Smith:

Q. Did you have that information all in any one compre- [329] hensive place? A. Yes sir.

Q. Where does that appear in your books?

A. On this book.

Q. I thought you said you knew where Maehl stood on the 50 acres before you made this computation. A. We did.

Q. Do you have a book,——

A. The records would show that.

Q. Does it show at all in one place?

A. On the ledger?

Q. Yes. A. I think it does.

Q. Well let's see that. I thought the purpose of this summary was because everything was scattered, all the information that appears on this doesn't appear in any one place on the ledger and you had to pick out some here, there and the other place and put it on here before you knew. A. Yes.

Q. Take your ledger sheet and Maehl contract 1, what does it show as to the expenditures charged against Maehl up until the time,——

A. The ledger shows $4387.62.

(Testimony of J. A. Barnard.)

Redirect Examination

By Mr. Toole:

Q. And at that time,—it is alleged by the complaint,—do you recall how many acres he had cleared? A. I think it was 24.

Q. At $100.00 an acre? [330]

A. Yes sir.

Q. And he had partially cleared, I think you said, some other amount,—some 12 acres.

A. Yes.

Q. And what total value was put on that?

A. On the 12 acres?

Q. On the 24 fully cleared plus the 12 partially cleared,—you have it on your yellow sheet if you will just look at it there.

A. $2700.33 was the value put on it.

Q. So that when you said he was about $2500.00 in the hole, what figures did you refer to?

A. Difference between that and the expenditures.

Q. And if you just take a pencil here and take the $2700.33 from the amount shown on the ledger,—and tell us how much it does amount to.

A. $1687.29.

Q. And is that substantially the information you had when you made the memorandum?

A. Yes sir.

Mr. Toole: I believe that's all.

(Testimony of J. A. Barnard.)

Recross Examination

By Mr. Smith:

Q. When was the ledger,—what date does that ledger sheet bear? A. This No. 2?

Q. Yes. A. The last date?

Q. Yes. A. March 31. [331]

Q. The totals here were the totals as of March 31? A. I presume so.

Q. And would they be compiled about that time?

A. I presume so.

Mr. Toole: When you said compiled, did you mean the ledger?

The Witness: Yes.

Mr. Toole: Yes. That's all.

Witness Excused.

The Court: Is this witness finally excused? Now does the plaintiff wish further access to the books and records?

Mr. Smith: No, your Honor.

The Court: Well, they will be kept here in Missoula until the termination of the trial and if you wish to make a further examination of them the Court will authorize you to do so. Call the next witness.

Mr. Toole: That's all for the defense, your Honor.

Defendant Rests.

The Court: Any rebuttal?

Mr. Smith: Yes; we will call Mr. Maehl.

And thereupon the following evidence was introduced by the plaintiff in rebuttal:

ERNEST MAEHL,

the plaintiff, was called in rebuttal and testified as follows: [332]

Direct Examination

By Mr. Russell Smith:

Q. Will you tell the court and jury, Mr. Maehl, the nature of the work done on the 50 acre tract at the time you ceased working there?

A. We had 24 acres cleared completely and that 12 acres,—kind of guessing at it,—and quite a lot of timber down on that when we quit work.

Q. And with respect to the 24 acres cleared, was there any timber down criss-cross in that area?

A. Not on the 24 acres.

Q. What did you say as to the amount of burning which had been done on the 24 acres?

A. They had it perfectly clean, everything that we could find.

Q. Now, in the clearing work, do your clearers work in different crews?

A. Most of the time in three.

Q. And tell us just how those crews are separated and what they do.

A. They generally have a bunch cut everything they can chop with axes go ahead and clear the

(Testimony of Ernest Maehl.)

underbrush and then a crew come cut the logs, and a crew burning in back.

Q. With respect to the 12 acres, what was the condition of that?

A. Was in good condition. Underbrush was practically all cut on the 12 acres and partly more.

Q. And how was the snow condition up there at that time?

A. Wasn't any snow after we felled the timber, was little in the standing timber. [333]

Q. What was the snow condition on March 14 and 15 as compared with the snow condition the earlier part of that winter?

A. Snow was practically gone on the 15th of March.

Q. Now, with respect to the,—having in mind the 24 acres cleared and the 26 acres which had not been completely cleared, can you tell us what the nature of the timber generally was on those two tracts?

A. Well, the timber was getting some lighter and smaller as we got up toward the upper end of the reservoir, had all big timber, 3, 3½ feet through.

Q. Is it more difficult to clear land with the heavy timber than the light?

A. Quite a difference.

Q. Which is more expensive?

A. Heavy timber.

Q. Now, what effect did the weather conditions

(Testimony of Ernest Maehl.)

existing from January 18 until March 14 or 15 have upon your clearing?

A. Well, during January and the biggest part of February it was awful cold and stormy quite a bit.

Q. And what about the trees themselves?

A. Well, they are naturally frozen and harder to burn than after they thaw out.

Q. What was the weather condition in March with respect to the timber?

A. Practically about the same as it is now. Nice, sunshiny weather.

Q. What was the condition of the trees as to being frozen? [334]

A. Wasn't frozen any more.

Q. Now referring, Mr. Maehl, to the tract known as the dam site, what was the condition of the dam site at the time that you finished.

Mr. Toole: Objected to as improper rebuttal. He has already testified to that on the direct examination. He stated that it was completely finished.

The Court: Well let him tell it again. It may be repetitious.

A. It was all cleared and grubbed except I think there was three little piles of stumps I think we didn't burn because it was close to some timber that had been cut,—too much danger running into the stand.

(Testimony of Ernest Maehl.)

Mr. Toole: Move the answer be stricken as not consistent with the,——

The Court: It will be stricken.

Mr. Toole: —not consistent with the original statement of the plaintiff as to the contract that he had and it is inconsistent with the pleadings.

The Court: It appears to me the matter was definitely covered on your direct case. The rebuttal must be based upon something that developed during the case of the defendant.

Mr. Smith: Was the dam site cleared, Mr. Maehl, as to the sides of the,—up on the hillside which was involved in the dam site?

The Witness: Yes.

Mr. Toole: Same objection. Move that the answer be stricken.

The Court: The objection will be sustained. [335] This was all gone into on the plaintiff's direct case. The defendat apparently has tried to prove its counter-claim based on the written contract for the 50 acre clearing. Now we are going back to the dam site which is included in the first cause of action set out in the complaint.

Mr. Smith: We will abandon this portion of the examination.

Q. During the course of your clearing on the 118 acres, Mr. Maehl, what if anything do you have to say with respect to whether the men employed by you were at all times engaged in dam site or in reservoir site clearing?

(Testimony of Ernest Maehl.)

Mr. Toole: Objected to for the reason that it assumes a state of facts that is not in the record. It is improper rebuttal.

Mr. Smith: Well I may say that my purpose is this, your Honor,——

Mr. Toole: Now if you please, your Honor, I don't want counsel to state any purpose unless the jury is dismissed.

Whereupon the jury was dismissed from the court room.

Mr. Smith: My purpose in this line of examination, your Honor, is this; the defendant has put in evidence certain amounts which Barnard-Curtiss claim to have paid on account of clearing on the 118 tract. We think they were improperly admitted but for the purpose,—we think that under the theory that they are admitted we think they are not competent evidence of payment, but the purpose of this examination is to show that those records at the time Mr. Maehl was there from time to time Barnard- [336] Curtiss came and borrowed men from him for a day, half a day or so, and so far as Mr. Maehl's knowledge is concerned there was never any credit given him on the books for any of the borrowed time.

The Court: The defendant denied the contract, as well as any payment on it, but if plaintiff produces testimony on a contract that doesn't exist, it seems to me defendant may prove what was done

(Testimony of Ernest Maehl.)
under it although that evidence was admitted merely for the purpose of crediting the witness.

Mr. Smith: Well with that understanding we withdraw the question.

The Court: The jury will have to solve that, not me. With the evidence before it the jury must determine whether the defendant contends all the payments were made on the 50 acre contract or whether there were some payments made on another contract included in the operation. Call in the jury. Will there by any further witnesses?

Mr. Smith: I had intended to call in some more witnesses along this line but in view of the situation,—

Thereupon the jurors resumed their seats in the jury box.

The Court: Do you wish to cross examine?

Mr. Smith: I want to go further with this witness.

The Court: Very well.

Q. Now, Mr. Maehl, referring to the time that you ceased to work on the 50 acre tract, the time when the 24 acres had been cleared and the 12 acres had been partially cleared, will you tell us the circumstances under which you ceased [337] to work on the job?

Mr. Toole: That is objected to as calling for parol evidence to alter the terms of a written contract,——

(Testimony of Ernest Maehl.)

The Court: Well, it may be altered by an oral executed agreement under the statutes so the objection will be overruled.

Mr. Toole: I want to make the further objection that that is not in issue in the pleadings——

Mr. Smith: What isn't?

The Court: Well the objection will be overruled.

Mr. Smith: Will you read the question, please?

Q. (read by reporter) Now, Mr. Maehl, referring to the time that you ceased to work on the 50 acre tract, the time when the 24 acres had been cleared and the 12 acres had been partially cleared, will you tell us the circumstances under which you ceased to work on the job?

A. Mr. Strickland come over to me one day, said that——

Mr. Toole: Object to any statement made by Mr. Strickland as not having been——

The Court: Well, it does appear that he was a superintendent.

Mr. Toole: —the further objection that he hadn't any authority to make or alter any contract.

The Court: Objection will be overruled.

Mr. Smith: Do you have in mind the substance of the question, Mr. Maehl?

The Court: Read the question again.

Q. (read by reporter) Now, Mr. Maehl, referring to the time that you ceased to work on the 50 acre tract, the time when the 24 acres had been cleared and the 12 acres [338] had been partially

(Testimony of Ernest Maehl.)
cleared, will you tell us the circumstances under which you ceased to work on the job?

A. Mr. Strickland come over to where I was working and he says "we are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should have been done." I asked him what he meant. He explained it to me that he had a lot of fellows that were supposed to be truck drivers and Caterpillar drivers that he wanted to keep, he says we would like to take this over now and finish the clearing with these men on account they wanted to hold them for other work. He says "you ain't making any money over wages anyway". I says "that's right", and he says he had more important work for me to do,——

Mr. Toole: Will you excuse me, Mr. Maehl. I move that the entire answer,——

The Court: Let the witness finish.

A. (continued) He said he would like,—that they had other work they didn't have anybody to qualify for it and wanted me to do it and I says "all right, if you pay us for the tools or return the tools to me and you can take the job over in the morning", which he did. That is all that was said at the time.

Mr. Toole: Now, I move that the answer be stricken as not responsive to the question; as a statement by a person who is not shown to have any authority to contract for Barnard-Curtiss Com-

(Testimony of Ernest Maehl.)

pany; upon the further ground that it is a statement which definitely alters a written contract by parol evidence; and upon the further ground that [339] if such a statement was made and if a mutual agreement was made to cancel the contract there was no consideration shown for it and for the furthere reason that it is not within the issues of the pleading.

The Court: The motion will be denied.

Mr. Toole: Note an exception, please.

Whereupon, at 12:00 o'clock noon, Tuesday, October 17, 1939, the jury was duly admonished and court was adjourned until Monday morning, October 23, 1939, at 10:00 o'clock a. m., at which time the trial was resumed. [340]

The Court: Ernest Maehl versus Barnard-Curtiss Company, is there any further proof?

Mr. Smith: We have, perhaps, just a few minutes more on our rebuttal.

The Court: And the defendant?

Mr. Toole: I think that ours will be very short; perhaps three questions to each of three witnesses only, on sur rebuttal.

The Court: And how long do you wish on the argument?

Mr. Smith: I would judge about oh 45 minutes; I haven't talked with Mr. Toole about it yet.

Mr. Toole: Well that seems sufficient to me.

The Court: 1714, Ernest Maehl versus Barnard-Curtiss Company. Proceed.

ERNEST MAEHL,

the plaintiff, resumed the witness stand, in rebuttal, and upon direct examination, continued, by Mr. Russell Smith, testified as follows:

Direct Examination

(continued)

By Mr. Smith:

Q. You are the same Ernest Maehl who was testifying at the recess we had last Tuesday?

A. Yes sir.

Q. At that time, Mr. Maehl, you testified, if you recall, relative to a conversation that you had with Mr. Strickland at about the time that you ceased to do any work on the site, do you recall that?

A. I do.

Q. Now with reference to that conversation, Mr. Maehl, was anything further said at that time between you and Mr. Strick- [341] land which you did not tell us about last Tuesday?

A. He said that——

Mr. Toole: —wait just a minute; before the conversation is given I want to add an objection to that which was made, in that the conversation referred to would be incompetent—in addition to the objections which were made. Your Honor will recall that last Tuesday they offered oral evidence to vary the terms of a written contract; I want to make this further objection that the conversation now referred to is a conversation which appears to

(Testimony of Ernest Maehl.)

have taken place subsequent to the date provided in the written contract for the completion, and that that would not be competent, the contract already having been breached or abandoned at the time that conversation took place.

The Court: The objection will be overruled.

Mr. Toole: Exception.

The Court: It will be noted.

Q. (read by reporter) Now with reference to that conversation, Mr. Maehl, was anything further said at that time between you and Mr. Strickland which you did not tell us about last Tuesday?

A. He said that the contract was—that we would call it square if I would handle that part of the clearing that was left so as to make a kind of a line —straighten up a kind of a line—it would terminate the contract.

Q. When you say straighten up the line, what do you mean by that?

A. Oh some burning of logs and stuff.

Q. Now approximately what date, if you remember, did this conversation take place? [342]

A. I think it was the 12 of March, either the 11 or 12.

Q. And when did you leave the job?

A. The 15 I think.

Q. Now Mr. Maehl with reference to the 20 acres of grubbing in what has been referred to as the borrow pit will you tell us at what time you commenced the work on that borrow pit?

(Testimony of Ernest Maehl.)

Mr. Toole: Objected to as improper rebuttal.

The Court: You may reopen your case in chief if you wish; otherwise the objection will be sustained.

Mr. Smith: Well I ask to reopen and ask this one question.

The Court: Very well.

Mr. Smith: Will you answer that question now please.

Mr. Toole: What is the question?

Mr. Smith: The question is with reference to the 20 acres in the borrow pit; at what time did you commence that work?

A. Some time around about the 20 of September.

Q. I want you to look at exhibits 16, 15 and 14, the plaintiff's exhibits, and tell me what items are made on those—I can't read them, maybe you are familiar with the items?

A. One item is 3 plumb axes; one saw handle; 2 hammer handles; and then they got this 1 jacking wrench, I guess it is, on here—I took out for Barnard-Curtiss's benefit.

Q. Now just tell us what the items are?

A. 3 plumb axes; a jacking wrench; and 2 saw handles; and 2 hammer handles; 400 feet of fuse; 200 caps, basting caps—I can't make the other item out myself, this last one I can't make out—and 400 feet of fuse and 300 caps—I [343] can't make out the other item.

Mr. Smith: I think that's all.

(Testimony of Ernest Maehl.)

Cross Examination

By Mr. Toole:

Q. Mr. Maehl when you went to Philipsburg, as I understand, you went in the store and purchased those items, did you? A. Yes sir.

Q. Charged them to Barnard-Curtiss Company?

A. Yes sir.

Q. And you never paid for them did you?

A. Not for these no.

Q. And when you signed the slip you signed your name to the slip? A. We had to do that.

Q. Directed the store to charge them to Barnard-Curtiss Company? A. Yes.

Q. You say you can't identify the date from the slip?

A. There is one here, that 11th month—6; and September 1 is one.

Q. What is the first one, November 6, did you say?

A. No this is September I think, it is September 16 or 11, I can't make it out—whatever it is.

Q. Well does it appear to you to be in September, the 16th, about?

A. This one is September 1.

Q. Now 1936, it would be? A. Yes sir.

Q. At that time you were on the dam site were you not, working on the dam site? [344]

A. Yes sir.

Q. And what is the date of the next one?

A. I can't make it out.

(Testimony of Ernest Maehl.)

Q. Which one is the one——

A. —this is the one.

Q. Exhibit 14, yes; now the next one is—tell us if it doesn't appear to be September 11 or 16—9?

A. It looks like a 16 to me but I ain't sure.

Q. Yes, it looks like the month of September—9? A. 9 should be the month of September.

The Court: Well the paper is in evidence; the jury will decide that question.

Q. Was that taken out at the time you were working at the dam site?

A. No I was working at the camp.

Q. And now Exhibit 16, where were you working at the time that was purchased?

A. I can't make out that date—the 16th or the 21st.

Q. Well can't you tell us where you were working at that time?

A. Well I was working between the dam site and the building the camp.

Q. So that on those three exhibits, the time the purchases were made, you were engaged either upon the dam site and on the camp is that so?

A. Well not any more at that time we was on the clearing but we wasn't on the dam site no more.

Q. You were being paid then for working at the camp were you not? A. Part of the time.

Mr. Toole: I think that's all. [345]

Mr. Smith: That's all.

Witness Excused.

Mr. Smith: The plaintiff rests.

And thereupon, the plaintiff having rested his case on rebuttal, the following evidence was introduced by the defendant in surrebuttal:

J. A. BARNARD

was called as a witness in sur rebuttal and testified as follows:

Direct Examination

By Mr. Toole:

Q. Mr. Barnard have you looked at Plaintiff's Exhibit 14, 15 and 16, which were just testified to hear? A. Yes.

Q. Well do you now have in your hand the same summary or computation from which you testified with respect to the expenditures of Barnard-Curtiss Company on this work? A. Yes I have.

Q. Now with reference to the charges on Exhibits 14, 15 and 16, state against what items the charge was made, so far as Barnard-Curtiss' books were concerned?

Mr. Smith: I object to this as improper rebuttal.

The Court: Overruled.

A. Exhibits 14, 15 and 16, I take it, are these charges?

Q. That's right.

A. And you want to identify them against the charges made on this sheet?

Q. Yes that's right?

A. There is a note against an item of purchases, of $362.63, notation was made and has been on the

(Testimony of J. A. Barnard.)

sheet right along, [346] stating $131.36 of this belongs to clearing and grubbing on the dam site.

Q. And state whether or not the three items—the three exhibits—are a part of that $131.00?

A. These three are a part of that, yes.

Mr. Toole: Now I think that's all.

There was no cross examination of the witness and the

Witness Excused.

R. W. BARNARD

was called as a witness in sur rebuttal and testified as follows:

Direct Examination

By Mr. Toole:

Q. I am handing you the Defendant's Exhibit 10, which is a bill submitted by Ernest Maehl to Barnard-Curtiss Company; did you at the time or at about the time that that bill was submitted to you say to Mr. Maehl words to this effect: "We haven't got our final estimate yet so we can't discuss clearing with you," or words to that effect?

Mr. Smith: Objected to as improper sur rebuttal. The exhibit, your Honor, was introduced at the time of the examination of Mr. Maehl; he was ques-

(Testimony of R. W. Barnard.)

tioned as to this conversation in our re-examination of him on our case in chief, and in defendant's case in chief nothing was said about it. We therefore object to it as incompetent.

The Court: Well you might consider it a part of the redirect. Overruled.

Q. Did you make such a statement or a similar statement? A. No. [347]

Cross Examination

By Mr. Russell Smith:

Q. Did you have any conversation with Mr. Maehl at or about the time that that bill was presented?

A. Well how close to the time, do you mean the time he handed it to me?

Q. Yes. A. No not at that time.

Q. Where were you at that time?

A. Well I was down at the Courtenay Hotel, over in the hotel.

Q. And at Philipsburg? A. Yes.

Q. And had you seen Mr. Maehl prior to the time you received this bill?

A. Yes I saw him around there several times.

Q. Did you have any conversation with him immediately, within a day or so preceding that?

A. Yes.

Q. And was this matter mentioned in those conversations? A. You mean what matter?

(Testimony of R. W. Barnard.)

Q. The matter—was anything said in those conversations about a bill or about the claim that Mr. Maehl had against you, or anything of that sort?

A. Well he handed me this bill.

Q. And that was all that was said?

A. At that time yes.

Witness Excused. [348]

OSCAR STRICKLAND

was called as a witness in sur rebuttal and testified as follows:

Direct Examination

By Mr. Toole:

Q. Mr. Strickland did you on or about the 12 day of March, 1937, at the site of the 50-acre written contract for clearing, say to Mr. Maehl words to this effect—did you say to him about the middle of March, 1937, with respect to the 50-acre contract, words to this effect: "We are getting too big a crew, a lot of men too many, and we want to make a change, and you get off the ground," or words to that effect, did you? A. No.

Mr. Toole: That's all.

And there being no cross examination of the witness the

Witness was Excused.

And thereupon counsel for defendant announced the defendant rests its case on sur rebuttal.

Mr. Smith: May it please the court I have one more question I forgot to ask Mr. Maehl.

Mr. Toole: Sure.

The Court: Very well, recall him.

Thereupon the plaintiff,

ERNEST MAEHL,

was recalled for further rebuttal testimony, and testified as follows:

Redirect Examination

By Mr. Smith:

Q. Mr. Maehl will you tell us whether or not Barnard-Curtiss Company ever made any claim to you on account of the written [349] contract to clear —the 50-acre contract? A. No sir.

Q. When was the first time you had been advised that they had any claim against you in that respect?

A. When I saw the answer to my suit.

Recross Examination

By Mr. Toole:

Q. That is, Mr. Maehl, that Barnard-Curtiss Company didn't ask you to pay them anything, did they? A. To pay them anything?

Q. Until you sued them? A. No.

Q. Then when you sued them they counter claimed against you on the 50-acre contract, is that right? A. Yes sir.

Witness Excused.

The Court: Any further testimony?

Mr. Smith: We have no further testimony.

Mr. Toole: I guess that's all.

The Court: Anything further?

Mr. Smith: Not for the plaintiff.

And thereupon the the testimony was closed.

The Court: Very well, open for the plaintiff; 45 minutes on a side, since it is your choice.

Mr. Toole: I wasn't aware counsel was going to argue so quickly; I want to make a motion before proceeding with the case; it will be rather a long motion.

The Court: And how long will it take?

Mr. Toole: About 10 minutes or 15, I couldn't say exactly. [350]

And thereupon, with the usual admonition by the court, the jury was excused from the court room and withdrew.

Mr. Toole: Now comes the defendant, Barnard-Curtiss Company, and moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff, on the plaintiff's first cause of action, upon the grounds and for the reasons that the plaintiff has failed to prove that he ever made any contract, either 118 acres or less, for clearing, as alleged in the complaint, or in any other manner. For the further reason that if any such contract was made the plaintiff's own proof is that it was originally made with Maehl and Metcalf, and that for that reason there is a fatal variance be-

tween the pleadings and the proof; upon the further reason that even if such contract was made, and even if no such variance did exist, the plaintiff has failed to prove by any evidence that such contract was executed and carried out by him.

Now as to the second cause of action the defendant moves the court to direct the jury to return a verdict for the defendant and against the plaintiff upon the grounds and for the reasons that the plaintiff has failed to prove that he made any contract with the defendant for clearing and grubbing, or grubbing, the 20 acres, and for the further reason that even if such contract was made there is a fatal variance between the proof and the pleadings, and for the further reason that there is no evidence whatsoever to prove that the plaintiff carried out and executed such contract, if the same ever was made.

Defendant further moves the court to direct a verdict of the jury, to return a verdict for the defendant and against [351] the plaintiff on the sixth cause of action, that being the cause of action wherein the plaintiff alleges that he earned $1.20 an hour and was paid only 85 cents an hour, upon the grounds and for the reasons that there is no proof whatsoever to sustain any claim under that cause of action, plaintiff's own proof being that he was out there as a foreman and that he accepted 85 cents per hour, and was on the pay roll during all of that time, and the record being clear that he was

so classified by the National Re-employment Service, which, under the contract in evidence, was the agency which designates the salary to be paid on that contract.

And thereupon the matter was argued by respective counsel.

The Court: Defendant's motion for a directed verdict in his favor on count 1; defendant's motion for a directed verdict in his favor on count 2; and defendant's motion for a directed verdict in his favor on count 6, of the complaint, are each and all denied.

Mr. Toole: Note an exception.

The Court: The exception is noted.

Mr. Toole: Now comes the defendant and moves the court to direct a verdict, a general verdict, for th defendant and against the plaintiff, in the amount of $3320.09, on the ground and for the reason that the proof shows conclusively that even if all of the contracts pleaded in the complaint were made, and even if all of the services pleaded were rendered, the plaintiff owes an unpaid balance to the defendant on a general verdict—a general accounting between [352] them—in the amount of $3320.09.

The Court: The motion will be denied.

Mr. Toole: Note an exception.

The Court: Exception will be noted.

Mr. Smith: We now move the court, if your Honor please, to direct a verdict for the plaintiff on

the counter claim now contained in defendant's answer, on the ground and for the reason that the contract itself limits any money which Barnard-Curtiss might have a right to receive from Maehl, to moneys which may become due him, and there is nothing in the contract which authorizes the defendant to charge the plaintiff with any surplus over the money which may become due to him.

And thereupon the matter was argued by respective counsel.

The Court: The motion will be denied. And the court will stand in recess for five minutes; keep the jury out until 10:50.

Whereupon a brief recess was had at the expiration of which the jurors resumed their seats in the jury box and the trial was resumed.

The Court: Proceed with the argument.

Thereupon, after argument by respective counsel, the court proceeded to instruct the jury orally, in words and figures as follows:

[Omitted per designation of appellant] [353]

Thereafter, on October 23, 1939, verdict was duly filed herein, being in the words and figures following, to-wit: [383]

[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled to try the issues in the above entitled cause find a verdict in favor of the plaintiff, Ernest Maehl in the sum of $3,368.91.

F. C. CUMMINGS
Foreman

[Endorsed]: Filed Oct. 23, 1939. [384]

Thereafter, on October 23, 1939, the Defendant's Objection and Exception to the Form of the Verdict, was duly entered herein, the minute entry thereof being as follows, to-wit: [385]

[Title of District Court and Cause.]

Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Ernest Maehl was recalled as a witness in rebuttal, whereupon plaintiff rested.

Thereupon J. A. Barnard, Robert W. Barnard and Oscar Strickland were recalled as witnesses in sur-rebuttal, whereupon defendant rested.

Thereupon Ernest Maehl was again recalled by plaintiff for further examination, whereupon the parties rested and the evidence closed.

Thereupon defendant moved the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff on the plaintiff's first cause of action, for lack of proof and for the reason

there is a fatal variance between the pleadings and the proof.

Thereupon the defendant moved the court to likewise direct the jury to return a verdict in favor of the defendant and against the plaintiff on the second cause of action, for lack of proof and for the reason there is a fatal variance between the pleadings and the proof.

Thereupon the defendant moved the court to direct a verdict in favor of the defendant and against the plaintiff, on the sixth cause of action, for lack of proof.

Thereupon court ordered that each and all of said motions be and are denied, to which ruling of the court the defendant then and there excepted and exception duly noted.

Thereupon plaintiff moved the court to direct a verdict in favor of the plaintiff and against the defendant on the counter-claim contained in defendant's answer, for reasons stated to the court and read into the record, which motion was by the court denied.

And thereupon, after the arguments of counsel and the instructions of the court, the jury retired in charge of sworn bailiffs, to consider of its verdict.

Thereafter, at 8:30 P. M., the jury returned into court with its verdict, counsel for the respective parties being present as before.

And thereupon the verdict of the jury was duly received by the court, read and filed, and by the

jury acknowledged to be its true verdict as follows, to-wit:

[Title of Court and Cause.]

"We, the jury duly empaneled to try the issues in the above-entitled cause find a verdict in favor of the plaintiff Ernest Maehl in the sum of $3,368.91.

F. C. CUMMINGS,
Foreman."

Judgment ordered entered accordingly.

Thereupon defendant objected and excepted to the form of the verdict on the ground and for the reason that a separate verdict should be returned by the jury herein on each cause of action stated in the plaintiff's complaint.

Entered in open court at Missoula, Montana, October 23, 1939.

C. R. GARLOW,
Clerk. [386]

Thereafter, on October 25, 1939, Judgment was duly filed and entered herein, being in the words and figures following, to-wit: [387]

In the District Court of the United States for the District of Montana, Missoula Division.

No. 1714.

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY,
a Corporation,

Defendant.

JUDGMENT ON VERDICT

This action came on regularly for trial upon the 14th day of October, 1939, the said parties appearing by their attorneys Pope, Smith & Smith and J. J. McDonald, counsel for Plaintiff, and Toole & Boone, for Defendant. A jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendant were sworn and examined. After hearing the evidence, the arguments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court with their verdict as follows:

> "Title of Court, Title of Cause. Verdict. We, the jury duly empaneled to try the issues in the above entitled cause find a verdict in favor of the Plaintiff, Ernest Maehl in the sum of $3,368.91.
>
> F. C. CUMMINGS,
> Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed and this does order, adjudge and decree that the Plaintiff, Ernest Maehl, do have and recover from the Defendant, Barnard-Curtiss Company, a corporation, judgment in the [388] sum of Three Thousand Three Hundred Sixty-eight Dollars and 91/100 ($3,368.91), together with interest at the rate of six per cent (6%) per annum from January 1, 1938, in the sum of Three Hundred Sixty-four Dollars and 96/100 ($364.96), together with the Plaintiff's costs of action taxed at $180.10.

Judgment entered this 25th day of October, 1939.

C. R. GARLOW,
Clerk
By G. DEAN KRANICH
Deputy

[Endorsed]: Filed and Entered Oct. 25, 1939.

[389]

Thereafter, on January 18, 1940, Notice of Appeal, was duly filed herein, being in the words and figures following, to-wit: [390]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Ernest Maehl, plaintiff herein, and to J. J. McDonald, Walter L. Pope, Russell E. Smith and Kendrick Smith, attorneys for the plaintiff:

You and each of you will please hereby take no-

tice that Barnard-Curtiss Company, a corporation, the defendant in the above entitled action does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment on the verdict made and entered in the above entitled action on the 25th day of October, 1939, wherein the plaintiff, Ernest Maehl was given judgment against the defendant, Barnard-Curtiss Company, a corporation, in the sum of Three Thousand Three Hundred Sixty-eight and 91/100 ($3,368.91) Dollars with interest thereon at the rate of six percent (6%) per annum from January 1st, 1938 amounting to the sum of Three Hundred Sixty-four and 96/100 ($364.96) Dollars, together with plaintiff's costs of action taxed [391] in the sum of One Hundred Eighty-eight and 10/100 ($188.10) Dollars.

You will further please take notice that this appeal is taken from said judgment and from the whole thereof.

Dated this 16th day of January, 1940.

HOWARD TOOLE
W. T. BOONE
Attorneys for Appellant,
Barnard-Curtiss Company,
a corporation.

Due and personal service and receipt of copy of the foregoing Notice of Appeal is hereby admitted this 16th day of January 1940.

RUSSELL E. SMITH
Attorney for Plaintiff

[Endorsed]: Filed Jan. 18, 1940. [392]

Thereafter, on January 18, 1940, Designation of Contents of Record on Appeal of Defendant, was duly filed herein, being in the words and figures following, to-wit: [393]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL OF BARNARD-CURTISS COMPANY, A CORPORATION.

Whereas, the Barnard-Curtiss Company, a corporation, the defendant in the above entitled action, has filed Notice of Appeal in the Circuit Court of Appeals in the Ninth Circuit from the judgment rendered in the above entitled action on the 25th day of October, 1939.

Now, Therefore, the said appellant does hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal:

(1) The complaint of Ernest Maehl, the plaintiff in the above entitled cause.

(2) The demurrer of the defendant, Barnard-Curtiss Company, a corporation.

(3) The order of the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, removing the above entitled cause for trial to the District Court of the United States for the District of Montana. [394]

(4) The order of the court overruling the demurrer of the defendant, Barnard-Curtiss Company, a corporation.

(5) The answer of the defendant, Barnard-Curtiss, a corporation, including exhibits as follows: Exhibit A, the clearing contract between Ernest Maehl and Barnard-Curtiss Company, a corporation.

(6) The reply of the plaintiff, Ernest Maehl, to counter-claims contained in the defendant's answer.

(7) The motion of the defendant, Barnard-Curtiss Company, a corporation, for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the above entitled action, including Exhibit D, the complaint of C. A. Metcalf vs. the Barnard-Curtiss Company, a corporation, filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite; Exhibit E, the complaint in the case of C. A. Metcalf vs. the Barnard-Curtiss Company filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, and a second action; Exhibit F, the affidavit of James Barnard, one of the officers of the defendant corporation; but excluding Exhibit A, the complaint in the above entitled action, which document appears elsewhere in the record; further excluding Exhibit B, the answer of the defendant Barnard-Curtiss Company, a corporation, in the above entitled action to the said complaint of the plaintiff Ernest Maehl, which document appears elsewhere in the record; and further excluding Exhibit C, the reply of the planitiff, Ernest Maehl, to

the answer of the defendant Barnard-Curtiss Company, a corporation, which document appears elsewhere in the record. [395]

(8) The motion of the defendant, Barnard-Curtiss Company, a corporation, for a reference of the above entitled action to a master.

(9) The affidavit of Howard Toole in support of the motion of the defendant, Barnard-Curtiss Company, a corporation, for a reference of the above entitled action to a master.

(10) The order of the court overruling the motion for reference.

(11) The transcript of the proceedings at the trial of said action in question and answer form by reason of the assignment of the appellant that there is not sufficient evidence in all of the record to sustain the verdict or judgment.

(12) The verdict.

(13) The clerk's minute entry showing the objection of the defendant, Barnard-Curtiss Company, a corporation, to the form of the verdict.

(14) The judgment.

(15) The motion of the defendant, Barnard-Curtiss Company, a corporation, for a new trial.

(16) The ruling of the court on the motion of the defendant, Barnard-Curtiss Company, a corporation, for a new trial.

(17) The defendant's exhibits 1 to 12 inclusive, all of which were admitted and which appear in the proposed transcript of proceedings; plaintiff's ex-

hibits 14 to 16, inclusive, all of which were admitted and which appear in the proposed transcript of proceedings.

(18) The defendant's exhibit No. 13, being the [396] contract between the defendant, Barnard-Curtiss Company, a corporation, and the Water Conservation Board, which exhibit was admitted by the court.

(19) Notice of Appeal.

(20) Designation of Contents of Record on Appeal.

(21) The Supersedeas Bond.

Dated this 16th day of January, 1940.

HOWARD TOOLE
W. T. BOONE
Attorneys for Plaintiff.

Due and personal service and receipt of copy of the foregoing Designation of Contents of Record on Appeal of Barnard-Curtiss Company, is hereby admitted this 16th day of January 1940.

RUSSELL E. SMITH
Attorney for Plaintiff

[Endorsed]: Filed Jan. 18, 1940. [397]

Thereafter, on January 25, 1940, a Stipulation re designation of contents of record, was duly filed herein, being in the words and figures following, to-wit: [398]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties to the above entitled action by their respective attorneys, that the Designation of Contents of Record on Appeal of the defendant Barnard-Curtiss Company, may be amended as follows:

(1) By striking out Designation No. 15, the Motion for New Trial.

(2) By striking out Designation No. 16, the ruling of the court on the Motion for New Trial.

(3) By adding a new Designation numbered as follows:

(7½) The Order of the court overruling the Motion of the defendant, Barnard-Curtiss Company for the joinder of C. A. Metcalf as a third party, and the exception of the defendant, Barnard-Curtiss Company made at the time of such order.

Dated this 24th day of January, 1940.

RUSSELL E. SMITH
J. J. McDONALD
Attorneys for Plaintiff
HOWARD TOOLE
W. T. BOONE
Attorneys for Defendant.

[Endorsed]: Filed January 25, 1940. [399]

Thereafter, on February 5, 1940, Bond on Appeal was duly filed herein, being in the words and figures following, to-wit: [400]

[Title of District Court and Cause.]

BOND

Know all men by these presents, That we, the undersigned, Barnard-Curtiss Company, a corporation, as principal, and the Seaboard Surety Company, a corporation, duly qualified and authorized to execute bonds and undertakings and to act as surety within the State and District of Montana, as surety, are held and firmly bound unto Ernest Maehl, the plaintiff above named, in the full sum of Four Thousand Five Hundred ($4,500.00) Dollars, to be paid to the said plaintiff, his successors or assigns, to which payment, well and truely to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16 day of January, 1940. [401]

The condition of this obligation is such that whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said court, wherein Ernest Maehl is plaintiff and Barnard-Curtiss Company, a corporation is defendant, a judgment was rendered against the defendant, Barnard-Curtiss Company, a corporation, in the amount of Three Thousand Nine Hundred Twenty-one and 97/100

($3,921.97) Dollars which judgment was made and entered on the 25th day of October, 1939, and

Whereas, the defendant, Barnard-Curtiss Company, a corporation has filed in said action its notice of appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said defendant proposes to prosecute said appeal to reverse said judgment and desires that execution thereon be stayed pending determination of said appeal;

Now, therefore, in consideration of said appeal and the said supersedeas, if the above named, Barnard-Curtiss Company, a corporation, as such defendant shall prosecute its appeal to effect or shall pay said judgment and answer all damages, interest and costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect. [402]

BARNARD-CURTISS COMPANY,
a corporation
By M. W. BARNARD
Principal

RW

SEABOARD SURETY COMPANY,
a corporation
By G. H. LUTHER
Its Attorney-in-fact thereunto
duly authorized

Surety

G. H. LUTHER
Montana Resident Agent.

Approved February 5, 1940.

JAMES H. BALDWIN
U. S. District Judge.
District of Montana.

[Endorsed]: Filed Feb. 5, 1940. [403]

Thereafter, on February 5, 1940, Order of Transmission of Original Exhibits was duly filed and entered herein, being in the words and figures following, to-wit: [404]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS.

Upon application of counsel for the Barnard-Curtiss Company, a corporation, the defendant in the above entitled action, as appearing in the Designation of Contents of the Record on Appeal, it is hereby ordered that in connection with the appeal of the said defendant, Barnard-Curtiss Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, all original exhibits introduced in evidence in said cause may be transmitted to the said Appellate Court for its inspection.

Dated this 5 day of January, 1940.

JAMES H. BALDWIN
Judge of the United States District Court, District of Montana.

[Endorsed]: Filed and Entered Feb. 5, 1940. [405]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 405 pages, numbered consecutively from 1 to 405 inclusive, constitute a full, true and correct transcript of all portions of the record in case No. 1714, Ernest Maehl vs. Barnard-Curtiss Company, required to be incorporated therein by designation of appellant and Stipulation of the parties, as the record on appeal therein, except, the exception of defendant to the order of the court denying its motion to make C. A. Metcalf a third party, of which there is no record, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, the following exhibits introduced and received in evidence at the trial of said cause, to-wit: defendant's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, and plaintiff's exhibits Nos. 14, 15 and 16.

I further certify that the costs of said transcript amount to the sum of Forty-six and no/100 Dollars ($46.00) and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this February 6, A. D. 1940.

[Seal] C. R. GARLOW,
Clerk U. S. District Court,
District of Montana.
By H. H. WALKER
Deputy [406]

[Endorsed]: No. 9442. United States Circuit Court of Appeals for the Ninth Circuit. Barnard-Curtiss Company, a corporation, Appellant, vs. Ernest Maehl, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed February 8, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9442

BARNARD-CURTISS COMPANY,
a corporation,

Appellant

vs.

ERNEST MAEHL,

Appellee.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

You will please be advised that the appellant, Barnard-Curtiss Company, a corporation, does hereby designate for printing in the above appeal the entire transcript of the record forwarded to you by the Clerk of the United States Court for the District of Montana, in the above entitled action excepting therefrom only the court's instructions commencing on page 282 of the typewritten transcript, line 28 and ending on page 311 thereof, line 25, and that said appellant will rely upon the record in this appeal as so designated.

II.

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL

Whereas, the appellant, Barnard-Curtiss Company, a corporation, has filed notice of appeal and is taking an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in the above entitled action in the District Court of the United States for the District of Montana on the 25th day of October, 1939, and

Whereas, The record on appeal has been filed in said Circuit Court of Appeals,

Now, therefore, said appellant does hereby make and file its statement of the points upon which it intends to rely on said appeal:

1. The appellant contends that the court erred in overruling the demurrer of the appellant, Barnard-Curtiss Company, a corporation, to the complaint.

2. The appellant will contend that the court erred in denying the motion of the appellant, Barnard-Curtiss Company, a corporation, for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the above entitled action, said motion having been filed by the said appellant and having been denied by order of court on the 24th day of April, 1939.

3. The appellant will contend that there is not sufficient evidence in all of the testimony offered by the appellee to justify the court in submitting the first cause of action of the appellee, Ernest Maehl to the jury in that there was not sufficient proof to go to the jury upon the question of the maknig of the contract alleged in said first cause of action of the complaint.

4. The appellant will further contend that there was not sufficient evidence in all of the testimony introduced by the defendant to justify the court in submitting the second cause of action of the appellee, Ernest Maehl to the jury in that there is not sufficient proof of the making of the contract alleged in appellee's second cause of action.

5. The appellant will further contend that there is not sufficient evidence in all of the testimony submitted by the appellee to justify the court in submitting the appellee's sixth cause of action to the jury in that the evidence fails to show that the appellant ever agreed to pay the appellee the sums claimed by him in said sixth cause of action.

6. The appellant will contend that the court was in error in denying and refusing appellant's motions for a directed verdict upon the ground stated therein which motions appear at pages 280, 281 and 282 of the typewritten transcript. The order of the court overruling the said motions appears on page 281, line 16 and page 282, line 17 of the typewritten transcript.

7. The appellant will further contend that the court erred in overruling the appellant's objection to the form of the verdict.

Respectfully submitted,
HOWARD TOOLE
W. T. BOONE
Attorneys for Appellant,
Barnard-Curtiss Company a corporation.

Due and personal service and receipt of copy of the foreging Designation of Parts of the Record to be Printed and Statement of Points on which the Appellant intends to Rely on Appeal, is hereby accepted this 24th day of February, 1940.

J. J. MacDONALD
KENDRICK SMITH
Attorneys for Appellee,
Ernest Maehl.

[Endorsed]: Filed Feb. 27, 1940. Paul P. O'Brien, Clerk.

No. 9442

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

Brief of Appellants

Howard Toole
W. T. Boone
Attorneys for Appellant.

Upon Appeal from The District Court of The United States for The District of Montana.

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

Brief of Appellants

Howard Toole
W. T. Boone
Attorneys for Appellant.

Upon Appeal from The District Court of The United States for The District of Montana.

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JURISDICTION

This is an appeal from a judgment entered in the District Court of the United States for the District of Montana, Missoula Division, in an action on several contracts. The plaintiff, Ernest Maehl, a citizen and resident of the State of Montana, sued the defendant, Barnard-Curtiss Company, a corporation, and a citizen and resident of the State of Minnesota.

The amount in controversy is and was in excess of the sum of $3,000.00, exclusive of interest and costs. The cause was originally filed in the District Court of the State of Montana, in and for the County of Granite, and on petition and order was removed for trial to the United States District Court, in and for the District of Montana, Missoula Division.

The jurisdiction of the District Court of the United States is found in section 41, Title 28, United States Codes Annotated, section (1) (b); (Judicial Code, Section 24 as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states where the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

The appellate jurisdiction of the United States Circuit Court of Appeals is in section 225, Title 28, United States Codes Annotated (first paragraph); (Judicial Code, section 128 amended) wherein the Circuit Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the Supreme Court.

QUESTIONS PRESENTED

1. Whether, in an action by plaintiff to recover an amount alleged to be due him on an alleged verbal contract for clearing and grubbing the timber from a reservoir site in Granite County, Montana, a motion made by the defendant, Barnard-Curtiss Company, for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to said action (R. 38 to R. 55) should have been sustained in view of the fact that C. A. Metcalf was claiming that the defandant, Barnard-Curtiss Company, owed him the same amount of money per acre for clearing and grubbing the same reservoir under the same alleged verbal contract, rule 14 (a) and rule 22 (1) Rules of Civil Procedure for the District Courts of the United States, adopted pursuant to the act of June 19, 1934, and effective September 1, 1938.

2. Whether the plaintiff, Ernest Maehl, made sufficient proof of a verbal contract between him and the defendant, Barnard-Curtiss Company, for clearing and grubbing the timber from a reservoir site in Granite County, Montana, to justify the trial court in submitting plaintiff's first cause of action for clearing (R. 2) and plaintiff's second cause of action for grubbing (R. 4) to a jury and in denying defendant's motion for a directed verdict (R. 353-354).

3. Whether the plaintiff, Ernest Maehl, in an action upon an alleged verbal contract for clearing and grubbing the timber from a reservoir site in Granite Coun-

ty, Montana (R. 2-3-4) made sufficient proof of performance of said contract to justify the trial court in submitting the cause to a jury and in denying defendant's action for a directed verdict (R. 353-354).

4. Whether, in an action upon an alleged verbal contract for clearing and grubbing the timber from a reservoir site in Granite County, Montana, there was a fatal variance between the pleadings and the proof where the plaintiff, Ernest Maehl, admitted that the alleged contract if made was made between the plaintiff, Ernest Maehl and one C. A. Metcalf and was to be performed by the plaintiff Ernest Maehl and one C. A. Metcalf acting together whereas the complaint alleges that the alleged verbal contract was made between the plaintiff, Ernest Maehl, alone and the defendant.

5. Whether, in an action on a verbal contract for clearing and grubbing the timber from a reservoir site consisting of an area of about 118 acres the defendant, Barnard-Curtiss Company, made sufficient uncontradicted proof of the execution and breach of a written contract covering an additional 50 acres of clearing to require the trial court to direct a verdict in the sum of $3320.09 (R. 355) in favor of the defendant against the plaintiff on defendant's counterclaim for breach of the written contract (R. 30).

6. Whether, in an action by plaintiff, Ernest Maehl, against the defendant, Barnard-Curtiss Company, wherein plaintiff in the complaint (R. 2 et seq.) alleged seven separate causes of action, to-wit: First, for

$3439.70 for clearing 118 acres of the reservoir site on an alleged verbal contract of $100.00 per acre (R. 2); second, for $1300.00 for grubbing 20 acres under an alleged verbal contract at $65.00 per acre (R. 4); third, for work, labor and services alleged to have been performed by plaintiff for defendant in preparing and saving 6000 mine stulls (R. 7); fourth, for $105.60 for services alleged to have been rendered defendant by plaintiff in transporting workmen from Philipsburg, Montana, to a road camp (R. 8); fifth, in the amount of $64.00 for services alleged to have been rendered by plaintiff to defendant for hauling workmen from Philipsburg, Montana, to the dam site on Rock Creek (R. 9); sixth, in the amount of $148.05 for services alleged to have been rendered to defendant by plaintiff as Superintendent and foreman in camp construction (R. 6); seventh, in the amount of $91.40 for tools alleged to have been furnished by plaintiff to defendant (R. 12); and wherein defendant denies the making of the contracts contained in each of said causes of action and alleges affirmatively first, that it had a verbal agreement with the plaintiff, Ernest Maehl, to clear and grub 6.98 acres on the dam site and not on the reservoir site (R. 24) which contract said plaintiff failed to perform and under which plaintiff became liable to defendant for $774.45 for breach of contract and second, in which the defendant alleges the making of a written contract for clearing an additional 50 acres of the reservoir site (R. 26, R. 30) and the breach of said contract

by reason whereof defendant counter-claims in the amount of $8,942.36, a motion for a reference to a master for the purpose of taking evidence (R. 56) should have been sustained.

STATEMENT

In the fall of 1935 Barnard-Curtiss Company, a Minnesota corporation, authorized to engage in the construction business in Montana, filed a bid with the Montana Water Conservation Board (Montana State Water Board) bidding to construct what is referred to as the Flint Creek dam in Granite County, Montana, (R. 188). Among other items in the contract was an item for clearing the reservoir site which consisted of an area in excess of 118 acres. The contract also contained an item of clearing and grubbing between six and eight acres on the site of the proposed dam. There is some question as to the acreage involved in this action but that question is not material because the variance between the parties is slight.

At the time when the Flint Creek dam project was advertised for letting Barnard-Curtiss Company was constructing a highway job about 10 or 12 miles away (R. 189).

A man named C. A. Metcalf and also the plaintiff, Ernest Maehl, had worked for Barnard-Curtiss Company prior to that time (R. 189) and J. A. Barnard, secretary-treasurer, went to see these men and drove them out to the site of the dam (R. 190). This was in the fall of 1935 (R. 190). It is admitted by Mr. Barn-

ard (R. 192) and by Mr. Maehl, the plaintiff, on cross examination (R. 168) that the discussion or conversation had to do with Metcalf and Maehl taking a contract together for the clearing. Mr. Maehl, the plaintiff, after stating that Mr. James Barnard and his brother, Bob Barnard, had accompanied him and Mr. Metcalf to the site of the reservoir (R. 167) stated that the proposal was that he, Maehl, and Metcalf were going in together on the clearing. His testimony on cross examination was as follows (R. 168):

> "Q. Well I know he asked you but Mr. Metcalf was right there and you and Mr. Metcalf were together, weren't you?
>
> "A. Yes.
>
> "Q. And it was your intention and Mr. Metcalf's to do the work together, isn't that so?
>
> "A. At that time yes.
>
> "Q. And all the conversation was about you and Mr. Metcalf doing the job together?
>
> "A. Yes at that time.
>
> "Q. And even though Mr. Barnard turned to you and said 'Maehl what will you do this clearing for,' Mr. Metcalf was there, and you knew that he referred to you and Metcalf?
>
> "A. Well he didn't say it in them words.
>
> "Q. But you knew that was it didn't you?
>
> "A. We figured on going together if we got that contract.
>
> "Q. And the conversation in 1935, that conversation was all with respect to you and Metcalf getting together and taking the clearing together?
>
> "A. At that time yes."

However, in the fall of 1935, Barnard-Curtiss Company was not low bidder for the construction of the dam (cross examination of Ernest Maehl) (R. 116) and

the project was awarded to another contractor by the Montana State Water Board (R. 195) (R. 117). The contractor to whom the work was awarded (R. 195) refused to proceed and the project was re-advertised the next year, 1936 (R. 195). Barnard-Curtiss Company bid on it a second time and was the low bidder (R. 196).

Mr. Barnard went out to the Rock Creek road job being done by Barnard-Curtiss Company and again met Mr. Maehl in 1936 at which time, according to Mr. Maehl's own testimony Mr. Barnard said to him, "Maehl will you stand by the agreement you made last year?" His words were as follows (R. 168-169):

> "Q. Then in 1936 Metcalf wasn't with you at all was he?
>
> "A. No.
>
> "Q. And you say Mr. Barnard came out on the West Fork job—that was a road job—and said 'Maehl will you stand by the agreement you made last year?' I believe that's what you said?
>
> "A. Yes sir.
>
> "Q. And you said 'Yes?'
>
> "A. Yes.
>
> "Q. And that was all that was said?
>
> "A. That's all.
>
> "Q. Sir?
>
> "A. That was all.
>
> "Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?
>
> "A. No.
>
> "Q. You and Metcalf never went together to do the clearing, did you?
>
> "A. No we didn't."

As shown by defendant's Exhibit 2 (R. 130) which was an assignment slip from the National Reemploy-

ment Service dated August 20, 1936, signed by Ernest Maehl he reported to work on August 24 as a laborer at 60 cents per hour. Mr. Maehl identified his signature (R. 129) on the assignment slip. He testified, however, that the rate of pay was wrong (R. 132) and he told Bob Barnard, superintendent for the defendant, that it should be 85 cents (R. 132) and that he got the 85 cents per hour (R. 132) This correction in wages was made on a re-classification slip of the National Reemployment Service admitted as defendant's Exhibit 3 without objection (R. 259). That slip was dated September 3, 1936, and Mr. Maehl's occupation was changed from laborer at 60 cents per hour to foreman at 85 cents per hour.

Mr. Maehl, according to his own testimony, went to work on the dam site August 24, 1936 (R. 121) in accordance with the assignment slip. He kept his own time book in his own handwriting (R. 123) and carried himself on the payroll beginning August 24, eight hours per day, and entered up his own time at 85 cents per hour during that week (defendant's Exhibit 1), the total amount paid him being $40.80 for 48 hours (R. 122, R. 124). He stated, "A. Only 80 cents an hour. That was what they agreed to give me as far as the clearing was concerned. That is, carried me on the payroll at that figure." Actually he carried himself at 85 cents per hour and the other men were paid 60 cents per hour (R. 125). From August 24 to September 11 he worked at the dam site and from September 11 until

November 9 he worked as foreman on camp construction (R. 128). On November 9 he became ill and left the job to return on December 28 (R. 136). From December 28 until January 15 he worked on the reservoir site at 85 cents per hour at which time he stated that the 118 acres had all been cleared.

He testified (R. 79; R. 80; R. 143 and R. 165) that Mr. Metcalf was the foreman while he was away but that he had never paid Mr. Metcalf personally, the latter having been paid by Barnard-Curtiss Company.

On January 18, 1937, three days after the 118 acres on the reservoir had been cleared, Ernest Maehl made a written contract with Barnard-Curtiss Company, defendant's Exhibit "A" attached to the answer (R. 30). This called for clearing 50 acres at the east end of the reservoir site and in no wise a part of the 118 acres hereinbefore referred to.

On his rebuttal the plaintiff stated that he cleared 24 acres of the 50 acres and partially cleared 12 acres (R. 334) and then was permitted over objection of counsel (R. 339) to state (R. 341) in support of his allegation in the reply (R. 36) that the written contract for clearing 50 acres was abandoned by mutual agreement when Mr. Stirckland, defendant's superintendent, told him that "We are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should have been done." He said Mr. Strickland explained (R. 341) that he had a lot of fellows that were supposed

to be truck drivers and Caterpillar drivers that he wanted to keep, and that he would like to take over and finish the clearing on account they wanted to hold them for other work, and that he answered (R. 341) "All right, if you pay us for the tools or return the tools to me you can take the job over in the morning."

Motion to strike the above evidence was denied (R. 341).

The record shows without contradiction the following:

1. Barnard-Curtiss Company paid for labor, clearing the 118 acres (Plaintiff's complaint) (R. 4) $8,360.30
2. Under the written contract while Maehl was clearing 24 acres and partially clearing 12 acres:
   a. For labor (R. 236) $4,301.30
   b. For Compensation insurance (R. 237) 193.18
   c. Feed and tools (R. 238) 55.48
   d. Horse rental (R. 238) 50.84
   e. Labor bond premium (R. 239) 43.00
   Total $4,779.84
3. After Maehl had cleared 24 acres and paritally cleared 12 under the 50-acre written contract Barnard-Curtiss took it over and completed the work at a total cost of ..... $6,862.85 (R. 241)

TOTAL $20,002.90

The total amount earned by Maehl for 118 acres at $100.00 per acre if he had a contract would have been $11,800.00 and the total amount for 24 acres under the written contract, $2,400.00 (R. 30), or a total of $13,-200.00.

The plaintiff Maehl dismissed his third cause of action with respect to furnishing stulls (R. 155). The fourth, fifth, sixth and seventh causes of action with respect to his wage claim and transportation of men and furnishing tools are of minor importance and will not be discussed in this brief.

On May 6, 1938, the complaint in this action was filed in the state court demanding a total on the seven causes of action in the amount of $5,572.75.

About July 20, 1938, C. A. Metcalf filed suit against the defendant, Barnard-Curtiss Company, demanding judgment against this defendant for clearing and grubbing 98.56 acres (R. 42-43). The amount of the demand in that suit was $2,990.00. On the same day Metcalf also filed suit in the state court (R. 48) for $410.00 on an alleged verbal contract for producing 6000 mine stulls.

C. A. Metcalf was called as a witness by the defendant, Barnard-Curtiss, in the Maehl case and after defendant, Barnard-Curtiss Company, had demonstrated that the witness C. A. Metcalf was an adverse witness (R. 280, R. 282) the court asked him if he was claiming for cutting the same timber that Mr. Maehl was claiming and the witness answered "Yes" (R. 282) as borne

out in the affidavit of J. A. Barnard on the motion for joinder of Metcalf (R. 52).

Thereupon the witness Metcalf testified in substance that he was present at the first conversation with Mr. Barnard at the reservoir site in 1935 (R. 276); that he and Maehl operating together made an agreement with respect to the clearing of the reservoir site (R. 284); that he was never Mr. Maehl's foreman (R. 284); that he carried out the work and was carried on the Barnard-Curtiss Company payroll (R. 284); that he had a contract with Barnard-Curtiss Company for the clearing (R. 286); and that he had sued Barnard-Curtiss Company for clearing practically the same area (R. 286); that the grubbing as alleged in Maehl's second cause of action was the same grubbing that he claimed a contract for (R. 288); that he had done all of the operating and that the original agreement was between Barnard-Curtiss Company and himself and Maehl (R. 282).

Barnard-Curtiss Company had filed its motion to join Metcalf as a third party defendant and that motion had been denied (R. 55).

At the conclusion of all of the evidence the defendant, Barnard-Curtiss Company, moved the court to direct a verdict in favor of the defendant and against the plaintiff for the reason that the plaintiff had failed to prove a contract for clearing the 118 acres referred to in his first cause of action or for grubbing the 20 acres referred to in the second cause of action upon the ground that no contract had been proven in the

original instance and that even if such a contract had been proven it was a contract between Maehl and Metcalf and not Maehl alone, and upon the further ground that even if a contract had been made with Maehl and Metcalf there was a fatal variance in the proof because Maehl had sued alone and not jointly with Metcalf (R. 353-354). The defendant further moved for a directed verdict on the sixth cause of action wherein the plaintiff Maehl claimed that he had earned $1.20 per hour upon the ground that there was no proof whatsoever to sustain a claim in the amount of $1.20 per hour and that the only creditable proof in the record was that he earned 85 cents per hour which he was paid (R. 354).

The motions were denied by the court (R. 355).

SPECIFICATION OF ERRORS TO BE URGED

The appellant will rely upon all of the points set forth in its statement of points (R. 374) excepting only point No. 1.

SUMMARY OF ARGUMENT

It is not thought that the argument can be satisfactorily summarized but the discussion will proceed upon the assignments of errors as they appear in the statement of points relied upon, beginning with point No. 2 (R. 374) and up to and including point No. 7 (R. 376).

ARGUMENT

It is not intended to prolong this argument beyond the point where a reasonable understanding of appellant's position may be had. Reduced to its simplest

terms the contention of the appellant is that Barnard-Curtiss Company, defendant below, appellant here, gave the Montana Water Conservation Board a bid to construct the Flint Creek dam in the summer of 1935. The construction of the dam involved a large amount of clearing on the reservoir site apparently somewhat in excess of 168 acres, of which 118 acres is involved in the action on the verbal contract and 50 acres involved on the written contract.

Mr. Barnard, in the fall of 1935, took C. A. Metcalf and Ernest Maehl out to the job and asked them what they would do the clearing for and they said they would do it for $100.00 per acre. The conversation was mostly with Maehl but directed at both of the parties. All through his direct examination Maehl referred to himself as taking the contract alone but on his cross examination as quoted heretofore in this brief he finally fully and frankly admitted that he and Metcalf were going in together on it and that was the intention of the two men at the time this agreement was made to go in together if they got the contract (R. 168). He admitted, however, that they never did go together to do the clearing (R. 169).

As it turned out, Barnard-Curtiss Company was not the low bidder for the project. However, the successful bidder refused to proceed with the work and when the project was re-advertised in 1936, Barnard-Curtiss Company was the successful bidder. When this evidence developed (R. 64) counsel for the defendant

moved to strike the evidence of the witness Maehl as not tending to prove the making of the contract alleged in the complaint (R. 64-65). Counsel for the plaintiff stated that the conversation was incorporated in a later conversation so the court let the testimony stand in the record. About June 23 or 24, 1936, as stated by Mr. Maehl (R. 66), Mr. Barnard came to him again and told him he was going to make another bid on the dam and wanted to know if he, Maehl, would stay with the agreements the same as he had made them before, and Maehl said he would (R. 66). Maehl was asked:

> "Q. Did you at that time refer to the conversation which you had previously had with Mr. Barnard?
>
> "A. Yes sir.
>
> "Q. And what was said in that connection?
>
> "A. Wasn't anything said. I just took it that we would go ahead."

The above statement was made on Mr. Maehl's direct examination and leaves no doubt but that if any contract was ever made it was made between Maehl and Metcalf as one of the parties and Barnard-Curtiss Company as the other party. This is all born out in the testimony of Metcalf. He was called as witness for the defendant and it was proven by the defendant that Metcalf was also suing for the same clearing on the same alleged contract and that he was therefore an adverse witness. Counsel demonstrated the adverse interest of Metcalf (R. 281) and the court gave counsel for the defendant the right to cross examine and ask leading questions (R. 282). The court asked Metcalf

if he was claiming against Barnard-Curtiss Company on the same contract for clearing the identical land or a part of it and Metcalf said he was (R. 282). In answer to a question asked by the court he said:

> "The Witness: I contend that I done all the operating, I done all the work; we had an agreement whereby we would do this work together, and I done all the work.
>
> "The Court: In other words your contention is that the agreement was between the defendant Barnard-Curtiss Company and you and Maehl?
>
> "The Witness: Originally, yes."

Metcalf stayed on the job all of the time and was paid weekly by Barnard-Curtiss Company (R. 284) at 75 cents per hour (R. 285).

He testified further (R. 285) that when Maehl came back from the hospital he told Maehl that Maehl had nothing to do with the work and that the men were informed that they were working for Metcalf and not Maehl and that the men agreed and went ahead and took their orders from Metcalf (R. 285).

There are two or three indisputable items in the evidence to which the court's attention is particularly called. The first of these is defendant's Exhibit 1 introduced on Maehl's cross examination. These exhibits were admitted without objection and are so completely inconsistent with the existence of a contract that they become extremely important, not only to prove that no contract existed but to prove that no performance of any kind ever took place under any alleged contract.

The first exhibit referred to was introduced without objection upon the testimony of Ernest Maehl on cross examination. It is the assignment slip given Maehl by the Works Progress Administration and it appears on page 130 and 131 of the transcript. It is the usual assignment slip and it was signed by Ernest Maehl personally. It gave the name, identification number, address and the date, August 20, 1936. It stated that the person named would report ready for work at 8:00 A. M. on August 24, 1936, as a laborer at 60 cents per hour on the Barnard-Curtiss dam project in Granite County, giving R. W. Barnard as the name of the foreman or supervisor. It bore the certificate of Ernest Maehl saying that he was the person named as the employee. This assignment slip as so signed by Ernest Maehl and admitted in evidence on his testimony is completely inconsistent with the existence of any contract.

If the assignment slip itself could be explained away it still must be borne in mind that Maehl objected to the rate of pay and told Mr. Barnard that the pay should have been 85 cents per hour (R. 132). The rate of pay was changed and Maehl was paid 85 cents per hour (R. 132) upon the basis of a reclassification slip (Defendant's Exhibit 3) (R. 259) correcting the rate of pay and classifying Maehl as a foreman. The reclassification slip was signed by Mr. Barnard.

Furthermore, even if some reasonable explanation could be given by Maehl for the assignment slip and

reclassification slip it seems impossible to credit his statement that he had a contract in view of the fact that he proceeded to carry himself in his own time book (Defendant's Exhibit 1) (R. 122) at eight hours per day at 85 cents per hour. He started to work on the damsite on August 24, 1936, as a forman on the very day indicated in the assignment slip (R. 130) which was later corrected by the reclassification slip (R. 259). Maehl kept that time book in his own handwriting in the usual course of the business of Barnard-Curtiss Company and in the manner required of their foremen (R. 123).

There are two exhibits which appear in the record as Defendant's Exhibits 4 (R. 176) and 5 (R. 177) which were in the time book but have no bearing on Barnard-Curtiss Company work. They are time sheets kept on a separate contract wherein Clifton-Applegate Company were the contractors. However, Defendant's Exhibit 6 (R. 178) again shows E. Maehl as having gone to work on camp construction September 11, 1936, as testified to by him. He also worked on the camp during October, (Defendant's Exhibit 7) (R. 179) and finally became ill and stopped work November 9, 1936 (Defendant's Exhibit 9) (R. 181).

So we have Mr. Maehl performing all the way through under his own signature as a foreman at 85 cents per hour and there is no scintilla of evidence that he claimed that he was under contract during that period.

JOINDER OF METCALF AS A THIRD PARTY

QUESTION 1

Assuming that Barnard-Curtiss Company made a verbal contract in 1935, which is not admitted by appellant, it is clear from the testimony of Maehl himself and of Mr. Metcalf that such contract was made between them operating together as parties and Barnard-Curtiss as the other party. This is borne out by the statement of Metcalf that he was claiming under the same contract as Maehl and that he had sued Barnard-Curtiss Company separately in the state court under the same alleged contract. The motion for joinder (R. 38) was based upon the Maehl complaint in this action and upon the two complaints of Metcalf pending in the state court in Granite County, Montana (R. 42 and R. 48). The motion is further based upon the affidavit of J. A. Barnard setting forth the facts as to the conflcting claims of Maehl and Metcalf.

The motion was made under Rule 14 (a) and Rule 22 (1). Rule 22(1) of the Rules of Civil Procedure for the District Courts, Act of June 19, 1934, Chapter 651, reads as follows:

> "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims do not have a common origin or are not identical but are adverse of the several claimants or the titles on which their claims depend to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part

> to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20."

In the case of *Standard Surety & Casualty Co. of New York vs. Baker,* (U. S. C. C. A. 8th Cir.) 105 Fed. (2d) 578, the plaintiff bonding company had given a bond to guarantee that A. B. Collins and Company, a Missouri corporation, as a dealer in securities would comply with the provisions of the Missouri statute regulating such dealers. A. B. Collins and Company were adjudged bankrupt and thereafter numerous demands were made upon the bonding company. Several actions were pending in the state court of Jackson County and one had been commenced in the United States District Court, Western District of Missouri. Other claimants had filed claims against the Trustee in Bankruptcy. The plaintiff bonding company alleged that its liability was limited to $5000.00 but that the aggregate amount sued for was in excess of $20,000.00. Furthermore the plaintiff did not know to whom it might be obligated and in what amounts, if any.

In considering the applicability of Rule 22(1) and its relationship to the Federal interpleader statutes the court sustained the bill in the following language:

> "It may finally be determined that one or two only are entitled to recover, yet judgments might be procured on many of these claims simultaneously if defendants may proceed to the prosecution of

their various suits. There might not be opportunity to plead by way of amendment or supplemental answer, the recovery of a prior judgment against plaintiff on the same bond. Again, courts might not permit such a defense because, perchance, the courts might hold that satisfaction and adjudication of liability alone would satisfy the requirements of the bond. After recovery of judgments, execution might issue on all, and plaintiff might find it impossible to set aside final judgments. Even if it be assumed that the first to recover judgments or to issue execution should first be paid until the liability on the bond was exhausted, subsequent claimants in order of recovery might insist that the penalty should be apportioned (Thomas Laughlin Co. v. American Surety Co., supra), and liability on that ground might be asserted. In these circumstances there is a real threat of liability, and it was to meet such a situation that the interpleader statutes were adopted. As said in Metropolitan Life Insurance Co. v. Hamilton, N. J. Ch., 70 A. 677, 679, '* * * claims prosecuted in this way under the solemn sanction of legal proceedings in the courts are claims which the complainant has a right to regard as hazardous to its financial interests'."

It may be urged by the appellee in this case that interpleader or joinder of a third person may not be used as a means of ousting the state court of its jurisdiction but it will be noted that in the above case injunctions were granted restraining the prosecution of actions in the state and Federal courts until a trial of the interpleader suit.

In *Century Insurance Co., Limited, vs. First National Bank of Hughes Springs,* 102 Fed. (2d) 726, wherein claims against a bankrupt bonded warehouse

brought several actions to recover the proceeds of a fire insurance policy the court held that, even though the action was commenced prior to the passage of Rule 22, that the rule had had the effect of broadening the scope of interpleader and that upon retrial the liberal provisions under the rule should be made applicable.

Furthermore the Rules of Civil Procedure are entirely consistent with the practice in Montana. In *Security State Bank of Roy vs. Melchert,* 67 Mont. 355, the bank instituted a suit against Melchert for monies due the bank. O'Brien had assigned his estimate to the bank and there was a dispute as to the amount owed from Melchert to O'Brien. Other creditors had sued O'Brien and attached the money in Melchert's hands and Melchert sought to interplead all of the parties.

The court held that it was not necessary that Melchert admit that he owed O'Brien the full amount claimed but that he could in fact deny that he owed that amount and resist the claim and at the same time maintain the right to the joinder of the other creditors.

The Montana Statute involved is now section 9151, Revised Codes of 1935, containing language very similar to that in the Rules of Civil Procedure. The court said in part:

> "Manifestly it was the intention of our legislative assembly in enacting this statute to broaden the rule which obtained under the ancient chancery practice, by permitting additional parties interested in the subject matter of the action to be brought in, to the end that a complete adjudication of all their rights may be had in the one action. This

statute supplements the interpleader statute by providing for a class of cases not comprehended by that section."

The language used in the Montana case just above cited is very similar to that used in the Federal Courts in the construction of these rules.

In *Morrell vs. United Air Lines, et al,* (D.C. N.Y.) 29 Fed. Supp. 757, plaintiff sued United Air Lines for damages for the death of a passenger on a plane which crashed alleging a defective cylinder in the motor as negligence. Defendant United Air Lines was given leave to join United Aircraft Corporation and Bethlehem Steel Company as third parties under Rule 14 alleging that they were the manufacturers of the defective cylinder. The third party complaints were sustained notwithstanding the failure of the defendant to allege jurisdictional facts and its was held that the third party defendants were properly brought into the action.

In *Burris vs. American Chicle Co.* (D.C. N.Y.) 29 Fed. Supp. 773, plaintiff sued for personal injuries alleging violation of the safety device law as negligence. The plaintiff was injured while cleaning windows on a building belonging to defendant. Defendant sought to have the Ashland Window and House Cleaning Co. brought in as a third party because it was claimed that the latter company had a contract for cleaning the windows and if there was any negligence it was that of the third party and not that of the defendant. It was held that Rule 14 applied and the defendant was permitted

to bring in the Ashland Window and House Cleaning Co.

Again in *Kravas, et al, vs. Great Atlantic & Pacific Tea Co.,* (D.C. Pa.) 28 Fed. Supp. 66, an action by plaintiff and her husband against the tea company to recover damages for personal injuries, the defendant sought to bring in Joseph Davis as the owner of the property in front of which the plaintiff was injured and against the Peoples-Pittsburgh Trust Company as a mortgagee in possession of said building. The question raised there was jurisdictional in that the third party defendants were residents of Pennsylvania and there was no diversity of citizenship but the court held to the rule that since it had jurisdiction in the original action the jurisdictional requirements were met with respect to the third party complaints.

The court further held that it was no objection to the third party complaints that the alleged claim of liability of the third party defendants arose out of a contract separate and distinct from the cause of action forming the basis of plaintiff's suit. The court said:

> "We see no merit in this contention, because the rule permits a defendant to bring in a third party, 'who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.' "

One of the late cases is *Gray vs. Hartford Accident and Indemnity Co.,* 31 Fed. Supp. 299. In the latter case the jurisdictional question was again raised and overruled and after having disposed of that question in

conformity with the cases hereinbefore cited and many others to the same effect, the court said:

> "In the study of objections made, we must consider that Rule 14 has for its well-accepted purpose the bringing of third parties 'so that the right of all persons concerned in a controversy might be adjudicated in one proceeding.' "

The cases just cited are not essentially different from the case at bar. In the case at bar the motion was for leave to join Metcalf as a defendant since Metcalf was claiming the same fund under the same alleged contract there could be no determination of the rights of Barnard-Curtiss Company without the joinder of Metcalf. Certainly if Maehl could obtain a final judgment in the Federal Court notwithstanding Barnard-Curtiss Company's denial of the making of the contract, it would be reasonable to expect that Metcalf would recover in the state court on the same claim and there is no known procedure by which an execution could be stayed out of the Federal Court pending litigation in the state court, or by which payment of a judgment in the Federal Court to Maehl could be offset against a judgment in the state court in favor of Metcalf.

It ought to be obvious that Barnard-Curtiss Company is given the right by either Rule 14 or Rule 22 to resist both claims in the same jurisdiction and that an inexcusable injustice would be done if it is denied that right.

QUESTIONS 2, 3, 4.

The second, third and fourth questions presented are

as to whether the plaintiff, Ernest Maehl, made sufficient proof of a verbal contract between him and the defendant, Barnard-Curtiss Company, for the clearing and grubbing referred to in the first and second causes of action.

The appellant is not relying in this appeal on any of the evidence offered by its witnesses but is discussing only the uncontradicted evidence of the plaintiff in connection with his allegation that a contract was made between him and the defendant for the clearing and grubbing in the first and second causes of action (R. 2 and R. 4) and the wages claimed in the sixth cause of action (R. 11).

The uncontradicted evidence given by the plaintiff himself is that he and Metcalf went with the two Barnard's to the site of the dam (R. 167) and that J. A. Barnard, directing his remark at Maehl, asked what they would do the clearing for. Mr. Maehl said $100.00 per acre, but as heretofore quoted from the evidence he said that he and Metcalf were going together if they got the contract and that the conversation in 1935 was all with respect to Maehl and Metcalf getting together and taking the clearing together. On his direct examination (R. 64) he had said that Barnard-Curtiss Company did not get the contract from the Montana Water Board at that time and counsel for the defendant moved to strike the testimony as not tending to prove the making of the contract as alleged in the complaint, that contract having been alleged to have been made

in July of 1936, a year later. Thereupon counsel for the plaintiff Maehl said that he would offer evidence to show that the conversation of 1935 was incorporated in a later conversation (R. 65). This statement of counsel brought out the proof that Jim Barnard spoke to Mr. Maehl in the fall of 1936 and said he was going to make another bid on the dam and wanted to know if Maehl would stand by his agreements *"same as I made before and I told him I would . . . ."* (R. 66). Counsel then asked him if anything had been said in 1936 with reference to the conversation previously had and in answer to that Maehl said there was such a conversation, and when asked what was said he answered: "A. *Wasn't anything said. I just took it that we would go ahead"* (R. 67).

Later on cross examination it devoleped that when he said we would go ahead he was referring to himself and Metcalf (R. 168-169).

So the uncontradicted facts, based on Maehl's own testimony, and supported by Metcalf who had sued in the state court on the same alleged contract and who was an adverse witness to the defendant (R. 282), are entirely clear that if any contract was made at all it had its inception in 1935 in an agreement to which both Maehl and Metcalf were the first parties. That agreement could not have been binding because Barnard-Curtiss Company failed to get the contract and everything was dependent upon that. Then when Barnard-

Curtiss Company got the contract in 1936 Maehl agreed to stand by the promise made in 1935.

The defendant, appellant here, is therefore confronted by the question as to whether or not in a case where two parties agree to do a clearing job, even though defendant may have accepted the agreement, one of those parties could later sue upon the theory that the contract was made by him alone.

This involves fundamental principles of contract and under the decision in the case of *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the Montana statutes and court decisions are controlling.

Section 7473, Revised Codes of Montana, 1935, reads as follows:

> "*Essentials of consent.* The consent of the parties to a contract must be:
>
> "1. Free;
>
> "2. Mutual; and,
>
> "3. Communicated by each to the other."

Section 7488, Revised Codes of Montana, 1935, provides:

> "*Mutuality of consent.* Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

Section 7493, Revised Codes of Montana, 1935, provides:

> "*Acceptance must be absolute.* An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."

Section 7527, Revised Codes of Montana, 1935, provides:

> "*Contracts—how to be interpreted.* A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Section 7539, Revised Codes of Montana, 1935, provides:

> "*Contract restricted to its evident object.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

It is unquestionably the law that before a contract comes into existence there must have been a meeting of the minds between the parties and upon the subject matter. It so happens that no Montana case has been found in which one party has attempted to collect upon a contract made by him jointly with another but the Montana Supreme Court has passed in numerour cases upon the general subject of the making of a contract. One of the cases referred to is *State ex rel Henderson vs. Board of State Prison Commissioners,* 37 Mont. 378, 96 Pac. 736. In that case the Board of Prison Commissioners advertised the letting of a contract for the care of the prisoners. In the advertisement there were numerous conditions some lawful and others unlawful and the plaintiff Henderson offered a bid which was at variance with the terms contained in the notice to bidders. The contract was not awarded to Henderson and he brought a mandamus action, somewhat in the nature of a suit for specific perform-

ance, to compel the Board of Prison Commissioners to award the contract to him. The court said:

> "The plaintiffs in this case were the offerors. They offered to care for the inmates of the state prison at thirty-nine cents *per capita* per day, and, in addition thereto, to 'guarantee' the state against certain supposed existing liabilities, under such rules and regulatons as the state board should prescribe. The board replied, in effect: 'Very well, we will declare you the lowest and best bidder and award the contract to you, provided you will "guarantee" the state by doing certain things (setting forth the things to be done.)'
>
> " 'An acceptance to be effectual must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is a counter-proposal and in neither case is there an agreement.' (9 Cyc. 267.) In the case of Bruner v. Wheaton, 46 Mo. 363, the court said: 'In order that an acceptance may be operative, it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay. To constitute a valid contract there must be a mutual assent of the parties thereto; and they must assent to the same thing in the same sense. Therefore an absolute acceptance of a proposal, coupled with an qualification or condition, will not be regarded as a complete contract, because there at no time exists the prerequisite mutual assent to the same thing in the same sense.'
>
> "In the case of Egger v. Nesbitt, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385, it was held that where one offers by letter to make a quitclaim deed for a named price and the person receiving

the letter accepts the offer on condition that other deeds are turned over to him, there was no binding contract.

"In the case of Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525, it was said: 'In order (that a contract of sale should result), there should have been an unconditional acceptance of (the) offer. There was but a conditional acceptance—one upon the condition that the title was perfect.'

"In the case of Harris v. Scott, 67 N. H. 437, 32 Atl. 770, it was held that plaintiff's reply to the defendant's offer of certain stock at a specified price that he would pay the price if the defendant had actually received a similar offer from others, as stated in her letter, and would give him their names, was a rejection of the defendant's offer and a new proposal. The court said: 'No contract for the sale of the shares to the plaintiff was completed. His acceptance of Mrs. Scott's offer was conditional. Their minds did not meet.' (See, also, Northam v. Gordon, 46 Cal. 582; Page on Contracts, sec. 47.)

"Treating the case as though plaintiffs' bid contained but one offer—that is, that they would care for the prisoners at thirty-nine cents per head per day, and that the counter-proposition that plaintiffs should also indemnify the state was first proposed by the board—there was no contract, for the reason that the counter-proposition was not accepted by the plaintiffs. And it makes no difference whether or not the board had authority to impose the additional terms, because the record shows that the board never intended to award the contract unconditionally, and the minds of the parties never met on that point. Indeed, the record shows that the plaintiffs never believed that the board had accepted the bid unconditionally. There is no contract unless the parties thereto assent; and they must assent to the same thing

in the same sense. It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition. (Spinney v. Downing, 108 Cal. 666, 41 Pac. 797). Mr. Page in his work on Contracts (section 42) uses this language: 'An intention to accept the terms of the offer as valid is ordinarily an essential element of a valid acceptance.' He cites the following cases in support of the text, viz.: Regan v. Regan, 192 Ill. 589, 61 N. E. 842, Holmes v. Holmes, 129 Mich. 412, 95 Am. St. Rep. 444, 89 N. W. 47, Fuller Co. v. Houseman, 114 Mich. 275, 72 N. W. 187, and Hanson v. Nelson, 82 Minn. 220, 84 N. W. 742, in all of which importance is attached to the intention of the party who was alleged to have made the contract. This case is much stronger than any of those just cited, as the record of the proceedings of the defendant board shows that the intention was not to declare the plaintiffs the lowest and best bidders, unless the condition subsequent was complied with. And the plaintiffs are not in position to claim that the board awarded them the contract stripped of all conditions, because it is manifest that the offer to 'guarantee' the state, made by them, was the inducement which led the board to make its finding."

In the case of *J. Neils Lumber Company vs. Farmers Lumber Company,* 88 Mont. 392, 293 Pac. 288, the facts were quite different from those in the case at bar but the court laid down the general principle in the following language:

"As a matter of law, the consent of parties to a contract must be mutual (sec. 7473, Rev. Codes 1921), and 'consent is not mutual, unless the parties all agree upon the same thing in the same sense.' (Sec. 7488, Id.) But this is subject to the exception stated in section 7488 that 'in certain

cases defined by the chapter on interpretation, they are to be deemed so to agree without regard to the fact.' "

To the same effect is the rule laid down in *Beale vs. Lingquist,* 92 Mont. 480, 15 Pac. (2d) 927:

> "It is elementary that, in order to effect a contract, there must be an offer by one party and an unconditional acceptance of it, according to its terms, by the other. (Glenn v. S. Birch & Sons Const. Co., 52 Mont. 414, 158 Pac. 834; Polich v. Severson, 68 Mont. 225, 216 Pac. 785; J. Neils Lumber Co. v. Farmers' Lumber Co., 88 Mont. 392, 293 Pac. 288; 13 C. J. 279.)"

The same rule is affirmed in *Montana-Dakota Power Co. vs. Johnson,* 95 Mont. 16, 23 Pac. (2d) 956, wherein it is said:

> "The undisclosed intention of the bank originally to treat the funds as held on special deposit, if the facts related would justify a finding that such was the result of the bank's action for a time, does not aid the plaintiff, as the mutual assent essential to the formation of a contract must be gathered from their outward expressions and acts, not those undisclosed. (Washington Shoe Co. v. Duke, 126 Wash. 510, 218 Pac. 232, 37 A. L. R. 611.)"

In view of the absence of a decision of the Montana court directly on the point appellant has made a search for authorities outside which are in conformity with the general principle announced in Montana. The Restatement of the Law of Contracts contains the following:

> "Section 129. An action to enforce a joint right under a contract must be brought by or in the name of all surviving obligees."

Williston on Contracts (Revised Edition, 1937) contains the following in section 80, page 231 of Volume I:

> "One of the necessary terms of any proposed contract is the person with whom the contract is to be made. Accordingly an offer made to one person cannot be accepted by another, even though the offeree purports to assign it. Nor does it make any difference whether it was important for the offeror to contract with one person rather than another. . . ."

Section 95, page 301, Volume I, Williston on Contracts:

> ". . . If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance.
>
> "Such an error in language may relate to the object to which the apparent agreement relates, to the person with whom it was made, or to any of its terms."

Corpus Juris Secundum, Section 28, Volume 17 (Contracts), reads as follows:

> "It is necessary to the validity of a written contract that the contracting parties be described, and the rules of certainty applicable to other essentials of the contract, ... are applicable to the specification and determinability of the parties thereto. It is of the essence of a contractual obligation that it be due to some particular person as distinguished from the general public, and a promise by an indefinite and unidentified number of persons to do a particular thing jointly cannot be enforced, as the promisee will not be permitted to proceed against selected persons to compel them to do by themselves what they have only promised to assist others in doing."

Section 40, Corpus Juris Secundum, Volume 17 (Contracts):

> "When an offer is made to a particular person it can be accepted by him alone, and is not transferable by him to another; nor can it be accepted by such other without the offeror's consent."

American Jurisprudence, Section 38, Volume 12:

> "An offer can be accepted only by the offeree. To constitute a valid contract, the minds of the parties must have met on the identity of the persons with whom they are dealing. Everyone has a right to select and determine with whom he will contract and another cannot be thrust upon him without his consent. It is immaterial whether the offeror had special reasons for contracting with the offeree rather than with someone else.
>
> "It is said that the consent of all persons having an interest in an option is necessary to its exercise by any one of them."

These principles of law were announced by the United States District Court for the District of Montana in *Schwartz vs. Inspiration Gold Mining Co.,* 15 Fed. Supp. 1030, at page 1037:

> "It is elementary that to constitute a contract the minds of the parties must have met upon the same thing at the same time; or, stated differently, a contract results from an offer by one party in form which may be accepted, and its unqualified acceptance by the other. Polich v. Severson, 68 Mont. 225, 216 P. 785; J. Neils Lumber Co. v. Farmers' Lumber Co., 88 Mont. 392, 397, 293 P. 288. The law is also too well settled to admit a doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be acertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite

that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law, section 7501, Rev. Codes Mont. 1921; Price v. Stipek, 39 Mont. 426, 431, 104 P. 195; Schwab v. McVey, 54 Mont. 422, 425, 171 P. 277; Thrasher v. Schreiber, 77 Mont. 221, 227, 250 P. 600; Evankovich v. Howard Pierce, Inc., 91 Mont. 344, 351, 8 P. (2d) 653; and, in order to form a contract, there must be an offer by one party and an unconditional acceptance of it by the other in accordance with its terms. And, if the acceptance falls within or goes beyond the offer or makes a condition at variance with the proposal, there is no contract, and the transaction amounts to one of proposals and counter proposals only. J. Neils Lumber Company v. Farmers' Lumber Company, 88 Mont. 392, 397, 293 P. 288, and cases there cited."

The general rules of law announced in the Montana cases have been repeatedly approved in other jurisdictions and in the absence of a Montana case upon the subject of the right of a party to a contract to insist upon an accurate agreement or understanding as to the other parties thereto, we submit a number of cases, all of which are in agreement upon the subject and as above stated, in harmony with the general rule in Montana. One of the leading cases upon the subject and a case in which a very thorough statement is contained is the case of *School Sisters of Notre Dame vs. Kusnitt* (Md.), 93 Atl. 928. That was a case in which the Sisters of Notre Dame, operating a hospital, contracted to purchase certain

rubber goods from Goodyear Hospital Rubber Company. Joseph S. Holstein appeared at the hospital and represented himself to be an officer in the corporation which he referred to as Goodyear Hospital Rubber Company. The facts disclosed that the Sisters thought they were dealing with a bona fide corporation and apparently placed a good deal of reliance on the name "Goodyear." The Sister Superior, however, by reason of the conduct of Holstein, immediately concluded that there was some misrepresentation or misunderstanding as to the nature of the representations made by Holstein and upon investigation learned that there was no such company and that apparently Holstein was the representative of one Kusnitt, an individual trader. The goods were rejected upon delivery and Kusnitt sued. The statement of the court is quite lengthy but the court of appeals of the State of Maryland summed up the facts as follows and in view of the thorough consideration given this question by the Maryland court we quote at length from the decision in that case:

> "The evidence to which we have referred at some length shows conclusively that the Sisters who made the contract in this case on behalf of the defendant thought they were contracting with and intended to contract with a company or corporation which owned a large factory in or just outside of Hartford, Conn., and employed a great number of men engaged in the manufacture of goods of the character mentioned in the contract; and it also shows that they were led to so believe by the statements and representations of the wit-

ness Holstein. It is true he denies that he said that the Goodyear Hospital Rubber Company was a corporation, but he admits that he told them that he represented a company of that name, and does not deny that he told them that the company had a factory just outside of Hartford where it employed a number of men in manufacturing goods of the kind he offered to sell, and that he was willing to give them the goods mentioned at a reduced rate in order to keep its men employed during the winter season; that there was in fact no such corporation, company or factory, and that the Sisters who represented the defendant in the negotiations never knew or heard of the plaintiff in this case until the suit was brought, and never intended to contract with him must be conceded.

"In Anson on Contracts (11th Ed.) section 184, the learned author, in speaking of 'mistake as to the identity of the person with whom the contract is made,' refers to the cases of Boulton v. Jones, 2 H. & N. 564, and Cundy v. Lindsay, 3 App. Cas. 459, as follows:

" 'In Boulton v. Jones, Boulton had taken over the business of one Brocklehurst, with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst. Boulton supplied them without any notice that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst, he refused to pay for them, and it was held that he need not pay. "In order to entitle the plaintiff to recover, he must show that there was a contract with himself." In Cundy v. Lindsay, a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, induced A. B. to supply him with goods which he afterwards sold to X. It was held that an innocent purchaser could acquire no right to the goods, because as between A. B. and Blenkarn there was

no contract. "Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no concensus of mind, which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides should be required." The result of the two cases is no more than this: That if a man accepts an offer which is plainly meant for another, or if he becomes party to a contract by falsely representing himself to be another, the contract in either case is void. In the first case one party takes advantage of the mistake, in the other he creates it.'

"In note 2 to page 169 it is said:

" 'The same result follows if the seller is induced to contract with B. on his representation that he is acting as agent for a named person.'

"Mr. Benjamin, in his work on Sales of Personal Property (3d Ed.) section 74, after reviewing the English and American cases says:

" 'Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him.'

"He then refers to certain cases where the contracts were held void, on the ground of fraud, and says, 'But they were equally void for mistake.' Mr. Brantley, in the Second Edition of his work on Contracts, says:

" 'It is well settled that if a man falsely represents that he is the agent of another, and thus obtains possession of property, there is no sale, and

the transaction is void. In this instance the seller intends to contract, not with the person before him, but with a prinicpal, who is either nonexistent or has not authorized the contract. There is consequently no meeting of minds between the seller and buyer. The offer or declaration of will by the seller is not met by a corresponding will on the part of any buyer, and the offer to sell, not being made to the party present, cannot be accepted by him.'

"He says also:

" 'That, where goods are ordered of one person and supplied by another, the latter has no claim against the purchaser ex contractu, unless he appropriates them after notice of the substitution, in which case he assents to the change.'

"The same rule is expressed in 9 Cyc. 401, 402, as follows:

" 'Mistake as to the identity of the other party arises where a person contracts with another believing him to be the one with whom he intends to contract, while, as a matter of fact, it is another person. Here, whether the mistake arises through the other's fraud, as when he falsely represents himself to be another, or accepts an offer which is meant for another, there is no agreement. One who enters into an agreement has a right to know with whom he is agreeing; and, when a person intends to contract with another, he cannot be compelled to accept a third person as the other party to the contract.'

"In Humble v. Hunter, 12 Ad. & El. 310, Lord Denman announced the rule in the statement:

" 'You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract.'

"And in Arkansas Co. v. Belden Co., 127 U. S. 379, on page 387, 8 Sup. Co. 1308, on page 1309 (32 L. Ed. 246), the Supreme Court says:

" 'But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." '

"In the case of Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9, the court said:

" 'To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and, upon the facts stated, no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterwards delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought the business of the Citizens' Ice Company, until after the delivery and consumption of the ice. . . . There was no privity of contract established between the plaintiff and defendant, and, without such privity, the possession and use of the property will not support an implied assumpsit. Hills v. Snells, 104 Mass. 173 (6 Am. Rep. 216). And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff. * * * A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. * * * In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. * * * If he had received notice and continued to

take the ice as delivered, a contract would be implied.'

"In the case of Edmunds v. Merchants' Transportation Co., 135 Mass. 283, 'the swindler introduced himself as the brother of Edward Pape of Dayton, Ohio, * * * the plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape,' and the court held that there was no contract with him, because the swindler who acted as his agent had no authority, and that there was no contract of sale made with any one, and that the relation of vendor and vendee never existed between the plaintiffs and the swindler.

"In the case of Rodliff v. Dalinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439, wool was delivered to a broker with the understanding that it was sold to an undisclosed manufacturer. It turned out that the broker in fact was not acting for the undisclosed principal, and the court held that there was no contract of sale.

"In the case of Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367, where the goods ordered by one person were supplied by another, the Supreme Court of Indiana held that the acceptance and use of the goods, without notice that they were so supplied, would not warrant a recovery because 'one of the indispensable elements of a contract—the mutual assent of the contracting parties'— was absent, and that, to support a recovery for goods sold and delivered, there must be a contract, either express or implied, between the person who ordered and the one who supplied the goods.

"The cases of Roof v. Morrisson, Plummer Co., 37 Ill. App. 37, Consumers' Ice Co. v. Webster, etc., Co., 32 App. Div. 592, 53 N. Y. Supp. 56, and Randolph Iron Co., v. Elliott, 34 N J.. Law, 187, are to the same effect.

"In this state the case of Fifer v. Clearfield Coal Co., 103 Md. 1, 62 Atl. 1122, is directly in point.

There the contract was made in the name of the Cambria Coal Company by one who represented that he was the agent of the company. The defendant was led to believe and thought that the Cambria Coal Company was a corporation. The evidence disclosed that there was no such corporation, and that the agent in fact represented the plaintiff, Clarence A. Fifer, who was trading as the Cambria Coal Company. In disposing of the case, Judge Page, speaking for this court, said:

" 'The testimony shows that the contract entered into by the appellee was with the Cambria Coal Company, which, so far as the record discloses, was a fiction, not representing any corporation or association. It is clear, from all the evidence, that the appellee and its agents, during the whole time the negotiations for the sale of the coal were going on, thought they were dealing with a corporation.'

"After referring to some of the evidence in the case, he said further:

" 'It is therefore clear that the appellee supposed it was dealing with a corporation and not with an individual; and, furthermore, the evidence will show that this belief on its part was induced by the conduct of Deitrich, the agent of the appellant. The law applicable to such a state of facts is thus stated in Anson on Contracts, p. 163 (8th Ed.) Mistakes as to the indentity of the person with whom the contract is made "arise where A. contracts with X., believing him to be M.; that is, where the offeror has in contemplation a definite person with whom he intends to contract." The author cites, in support of this position, the cases of Boulton v. Jones, 2 H. & N. 564; Cundy v. Lindsay, 2 App. Cases, 459. In the latter case, where "a person named Blenkarn, imitated the signature of a respectable firm named Blenkiron, induced A. B. to supply him with goods which he afterwards sold to X. It was held an innocent pur-

chaser could acquire no right to the goods, because as between A. B. and Blenkarn there was no contract.'' '

"After quoting the statement of Lord Cairns in that case, and citing the case of Roof v. Morrisson, Plummer Co., supra, this court further said:

" 'The author in a note adds: These cases must be distinguished from those where B. deals with A., supposing A. to be acting for himself, when in fact A. is acting for an undisclosed principal X. Applying these principles to the undisputed evidence in the case, it seems that the appellee was led to suppose that it was dealing with a corporation. * * * It did not intend to contract with an individual, and was misled by Deitrich in so doing. There was therefore no valid contract between the appellee and the appellant, and the latter cannot maintain this suit.' "

A similar case was decided in the court of appeals in the state of New York in *Paige vs. Faure,* 127 N. E. 898. In that case Faure, a dealer in automobile tires entered into a contract with Paige and one Lindner giving them the exclusive agency in the United States with the exception of certain areas to sell automobile tires bearing his name. Paige and Lindner proceeded with performance for a period of time and Lindner sold his interest in the contract to Paige who continued to perform for a period of time. The contract contained a provision for renewal and at the expiration of the period of the original contract Paige gave notice of his intention to request a renewal for a period of a year. Faure refused and thereupon was sued by Paige who was given a verdict against Faure. On appeal the decision was reversed and the appellate court said:

"There was no provision in the contract to the

effect that Paige and Lindner were to devote their time and use their best endeavors to further the interest of Faure, or in fact to do anything except to purchase $1,000 worth of tires and pay him for goods sold by them, whether from consigned stock or that purchased outright, on or before the 20th of the month following the date of sale. In view, however, of the credit and the exclusive agency given to them, it is fairly to be implied that they were to devote their time and do whatever was reasonable and necessary to selling the plaintiff's product. The contract meant something. It was not a mere scrap of paper. The owner of a product would not give to another the exclusive agency, covering a wide territory, to sell the same unless he believed an effort would be made by the one to whom such right was given to sell; and one would not take, if acting in good faith, an exclusive agency to sell another's goods unless he expected and intended to use reasonable efforts to sell. Wood v. Duff-Gordon, 222 N. Y. 88, 118 N. E. 214; City of New York v. Paoli, 202 N. Y. 18, 94 N. E. 1077; Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, 63 N. E. 550; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. Faure, during the life of the contract, could not sell his own goods, except in the territory reserved. The acceptance by Paige and Lindner of benefits under the contract imposed upon them a corresponding obligation for Faure's benefit. Wood v. Duff-Gordon, supra; Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918; Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N. W. 319. Unless this be so, then the transaction could not have the business efficacy which both parties must have intended it should have when the contract was executed.

"This naturally leads to the only other question presented by the appeal, and that is whether the

contract was assignable without Faure's consent; in other words, did Lindner's assignment to Paige of all his interest in the contract justify Faure in refusing, at the request of Paige, to renew the contract for another year? I am of the opinion that it did. Faure entered into a contract, not with Paige, but with Paige and Lindner. He was to have the benefit of the services of both, not one, in the sale of his product. He agreed to give credit to both, not one, and it may very well be, except for Lindner, he would not have executed the contract at all.

"The general rule is that rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relationship of personal credit and confidence. Nassau Hotel Co. v. Barnett & Barse Corp., 162 App. Div. 381, 147 N. Y. Supp. 283, affirmed, on opinion below, 212 N. Y. 568, 106 N. E. 1036; Wooster v. Crane & Co., 73 N. J. Eq. 22, 66 Atl. 1093; Hardy Implement Co. v. South Bend Iron Works, 129 Mo. 222, 31 S. W. 599; Montgomery v. De Picot, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84; Puffer v. Welch, 144 Wis. 506, 129 N. W. 525; Pollock on Contracts (4th Ed.) 425.

"No bilateral contract for personal services can be assigned by either party to it, without the consent of the other. Williston on Contracts, section 421. But it is urged that this case does not fall within the general rule, because there is a provision in the contract that 'This agreement shall bind and benefit the respective successors and assigns of the parties hereto.' When the whole contract is considered, I am of the opinion this did not give Lindner the right, without Faure's consent, to assign his interest to Paige. The intention of parties to a contract must be ascertained, not from one provision, but from the entire instrument. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022;

Herryford v. Davis, 102 U. S. 235. 26 L. Ed. 160. When this contract is thus considered, it is apparent that both Paige and Lindner were personally to devote their time to carrying out its terms. This necessarily follows from the language used, which shows that a personal trust and confidence were reposed in both of them. Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.

"In Nassau Hotel Co v. Barnett & Barse Corp., supra, the plaintiff owned a hotel and entered into an agreement with two men by the names of Barnett and Barse to conduct it for a period of years. Thereafter they formed a corporation and assigned the contract to it. The court held that as the contract involved a relation of trust and confidence, and as a party has the right to the benefit contemplated from the character, credit, and substance of him with whom he contracts, the contract was not assignable, notwithstanding there was a provision in it that—

" 'This agreement shall inure to the benefit of and bind the respective parties hereto, their personal representatives, successors, and assigns.'

"An authority very much in point is Hardy Implement Co. v. South Bend Iron Works, supra. There defendant entered into a contract with a firm composed of two persons, Hardy and Mason, for the sale of plows manufactured by it, to which a credit was to be given and certain discount advantages offered. Mason withdrew from the firm and transferred his interest in the contract to the plaintiff. Defendant refused to ship to the plaintiff the goods called for by the contract. Action was brought to recover damages alleged to have been sustained. A demurrer was interposed to the complaint, which was sustained, the court stating that where an executory contract is made between two parties and one of them consists of two

> persons, composing a partnership, and one of those persons withdraws from the firm, which is thereby dissolved, it is for the party who contracted with the firm to say whether the contract shall proceed or not. The principle upon which the rule stated is predicated is that a party cannot be forced to accept a contract which he did not, in the first instance, make, and to which he did not subsequently assent. Moore v. Vulcanite Portland Cement Co., 121 App. Div. 667, 106 N. Y. Supp. 393; Id., 204 N. Y. 680, 98 N. E. 1108; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Kemp v. Baerselman, (1906) L. R. 2 King's Bench, 604."

In *Boston Ice Co. vs. Potter,* 25 Am. Rep. 9, the defendant had purchased ice from plaintiff during 1873 but because of dissatisfaction with the manner of supply terminated his contract and made a contract for his supply with Citizens' Ice Company which business the plaintiff later bought and, without knowledge of defendant, delivered ice to the defendant. This was an action on account for ice sold and delivered. The court said in part:

> "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

In *Frissell vs. Nichols,* 114 So. 431, defendant had given a lease with option to purchase to two persons. One of the persons died and the other party together with the executor of the deceased person's estate undertook to enforce the option to purchase. Judgment for the plaintiff was appealed and the court reversed the cause, saying:

> "Accordingly where by express terms the

parties have excluded the idea of substituted performance no question upon the subject matter of the contract can arise. The death of either party in such a case terminates the contract . . ."

A contract made by one who believes he is contracting with a corporation is not enforceable where the evidence shows that the other party was not in fact incorporated.

Brighton Packing Co. vs. Butchers' Slaughtering and Melting Assn. (Mass.), 97 N. E. 780

Where one contracts to sell land to another and it later devoleps that the land is owned jointly by the seller and a third person no contract results under the rule that a person has the right to determine for himself with whom he will enter into contractual relationship.

Elder vs. Elwell (Minn.), 220 N. W. 415

There are a great many cases which apply the rules above stated to various situations where action has been brought by one individual to enforce the provisions of a contract not made originally with him but made either with such individual and another, or in which there has been a substitution of parties either by attempted assignment or otherwise. The cases hold almost unanimously that such contracts are not enforceable.

Friedlander vs. New York Plate Glass Ins. Co., 56 N. Y. S. 583 (1889)

Radliff vs. Dallinger, 4 N. E. 805 (Mass. 1886)

Cohen vs. Savoy Restaurant, 189 N. Y. S. 71

Parker vs. Dantzler Foundry and Machine Works, 79 So. 82 (Miss. 1918)

Werlin vs. Equitable Surety Co., 116 N. E. 485 (Mass. 1917)

D. C. Hardy Implement Co. vs. South Bend Iron Works, 31 S. W. 599 (Mo. 1895)

It follows from what has just been said that the evidence fails to justify the holding that any contract of any kind was made. The conversations were very vague and uncertain and certainly there was no meeting of the minds in 1935 because Barnard-Curtiss Company did not have the main contract for the construction of the dam and whatever may have been said was merely in the form of a discussion as to what might be done if the Water Board should award them the main contract. The Water Board did not award the main contract to Barnard-Curtiss Company that year and the contract certainly was not established in 1936 by the mere request made by Mr. Barnard when he asked Maehl if he would stand by the agreement made a year before and Maehl said "I just took it that we would go ahead" (R. 67). Subsequent to that conversation Maehl had himself assigned to the work as a foreman and both he and Metcalf were carried on the payroll throughout the entire job without any indication whatsoever to Mr. Barnard that they considered themselves as contractors.

But even if it should be held that the scanty evidence of a contract was sufficient to go to a jury, certainly it was a contract in which both Maehl and Metcalf were parties and unenforceable except and unless both of them had continued as partners or joint obligees so that neither of them could sue in his own name alone.

Everything that has been said in respect to the contract for clearing applies equally to the alleged contract for grubbing in Maehl's second cause of action.

In that cause of action he claimed a contract at $65.00 per acre for grubbing 20 acres which 20 acres was a part of the area cleared. He simply stated that Mr. Barnard came to him and wanted him to go ahead and grub a borrow pit (R. 86). No price was mentioned but he simply estimated the value of grubbing at $65.00 per acre and sued for that amount (R. 87). The complaint alleges that the defendant promised and agreed to pay $65.00 per acre but Maehl frankly admitted (R. 87) that nothing was said about the price but he considered the work to have that value. In other words his complaint is based upon an allegation of a specific contract and his proof upon a quantum meruit. During all of that time he was still carrying himself on the payroll as a foreman which fact completely negatives the idea that when Barnard told him to go ahead and do the grubbing, it was intended that he should be paid some contract price per acre for same. Counsel for the defendant objected to the evidence (R. 87) upon the ground that there was no meeting of the minds as to a contract and that there was

a material and fatal variance between the complaint and the proof (R. 88).

It is not thought that it is necessary to discuss at length the claim on plaintiff's sixth cause of action. That claim is for the difference between 85 cents per hour and $1.20 per hour during the time while Maehl was working at camp construction. The period of time is the same as that during which he claimed to have a contract for the clearing and grubbing and during all of that time he was working under an assignment slip from the Works Progress Administration as a foreman at 85 cents per hour and accepting that pay. There is no scintilla of evidence in the record to justify his claim in the amount of $1.20 per hour.

It is most respectfully submitted that with respect to the second third and fourth questions presented:

2. The plaintiff Ernest Maehl failed to make sufficient proof of a verbal contract on his first, second and sixth causes of action to justify submitting the same to a jury.

3. That even if such a contract had been made there is not sufficient proof of performance thereof to justify the trial court in submitting the cause to a jury.

4. That even if such contract had been made the same was between Ernest Maehl and C. A. Metcalf on one hand and Barnard-Curtiss Company on the other, whereas the pleadings allege that Ernest Maehl alone was the contracting party and thus there was a fatal variance between the pleadings and the proof.

QUESTION 5.

It is alleged in the answer (R. 26) that on the 18th day of January, 1937, Ernest Maehl and the defendant, Barnard-Curtiss Company, entered into a written contract for clearing 50 acres. The written contract is attached to the answer as Exhibit "A" and the execution admitted in the reply (R. 34).

However, the reply alleges (R. 36-37) that the plaintiff Maehl entered upon the work contemplated by said contract and that after he had cleared 24 acres and partially cleared an additional 12 acres, the contract was mutually abandoned and rescinded.

Ernest Maehl's testimony (R. 341) was that Mr. Strickland, superintendent for the defendant, came to him and said "we are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should be done."

Maehl stated (R. 341) that Strickland had said that they had a lot of fellows that were supposed to be truck drivers and Caterpillar drivers that he wanted to keep and that he would like to take over the clearing under the written contract and finish the clearing with those men because he wanted them for other work. He quoted Strickland as saying (R. 341) "you ain't making any money over wages anyway," and Maehl said, "That's right," and "all right, if you pay us for the tools or return the tools to me you can take the job over in the morning."

Counsel for the defendant moved to strike that testimony (R. 341-342) upon the ground that it had not been shown that Strickland had any authority to alter a written contract signed by the defendant and upon the further ground that the statement was an offer of oral evidence for the purpose of altering the terms of a written contract and for the further reason that there was no evidence of a consideration upon which to base an agreement of mutual cancellation.

The Montana Statute, section 7569, Revised Codes, 1935, is as follows:

> "*Written contracts—how modified.* A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

In *Continental Oil Co. vs. Bell,* 94 Mont. 123, 21 Pac. (2d) 65, a written contract had been made between the parties for the sale by Continental Oil Co. and the purchase by Bell of gasoline at "price to be charged for gasoline delivered at (naming two towns) to be four cents per gallon less than the sellers (plaintiff) quoted tank wagon price at (naming one of the above towns) on date of shipment."

The plaintiff oil company sued Bell for certain gasoline sold to him but Bell claimed, and was permitted to testify that at the time of making the contract it had been orally agreed between the parties that if at any time the contract price for the gasoline purchased was more than the "spot market price" the defendants

were to receive a refund of the difference between the two prices.

The plaintiff denied the oral agreement. There was a judgment for defendant and plaintiff appealed. The cause was reversed by the Supreme Court of Montana and the rule as to the admission of parol evidence to modify a written contract was stated as follows:

> "The test as to when parol evidence varies, adds to or contradicts a written contract was announced by this court in Hosch v. Howe, 92 Mont. 405, 16 Pac. (2d) 699, 700, quoting from Professor Wigmore as follows: 'The chief and most satisfactory index is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element.'
>
> "One of the important subjects dealt with in the written contracts was the price to be paid by the defendants for the gasoline purchased. The defendants' testimony tends to prove an oral contract to refund portions of this price, which was within the inhibition of the parol evidence rule, applying the foregoing test, unless some of the other recognized exceptions to the rule apply.
>
> "The correct application of this rule is illustrated in the following cases: Riddell v. Peck-Williamson Heating & Ventilating Co., 27 Mont. 44, 69 Pac. 241; Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064; Rowe v. Emerson-Brantingham Implement Co., 61 Mont. 73, 201 Pac. 316; Burnett v. Burnett, 68 Mont. 546, 219 Pac. 831; Swan v. LeClair, 77 Mont. 422, 251 Pac. 155.
>
> ". . . . . .
>
> "Counsel for the defendants attempt to distinguish between an agreement to reduce the price

and an agreement for a refund. We are, however, unable to subscribe to any such distinction, as in both types of agreement the result is the same—a change in the price specified by the written agreement through the medium of parol evidence. In order for oral testimony to come within the exception, it must not in any way conflict with or contradict what is contained in the written contract. The written contract must remain intact after the reception of the parol evidence. (10 R. C. L. 1038.)

". . . . . .

"The defendants urge that the testimony was admissible on the theory that it tended to prove an executed oral agreement. The record contains testimony with reference to reductions in price and some refunds under the 1928 contracts which were transactions apart from those under consideration. There were no refunds or reductions under the 1929 contracts other than the billing of the gasoline sold during the last two months of that year, but that would only amount to partial performance of the oral contracts. The defendants by their counterclaims were seeking to secure the further performance of these oral contracts for the year 1929.

"Section 7569, Revised Codes 1921, provides that 'a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' An oral agreement altering a written agreement is not executed unless its terms have been fully performed, and performance on the one side is not sufficient. There must be a complete execution of the obligation of both parties in order to bring the modification within the terms of the statute. (Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; Henehan v. Hart, 127 Cal. 656, 657, 60 Pac. 426; Thompson v. Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060; Harloe v.

> Lambie, 132 Cal. 133, 64 Pac. 88. Also see Curtis v. Parham, 49 Mont. 140, 140 Pac. 511; Armington v Steele, supra.)"

The case of Continental Oil Co. vs. Bell, 94 Mont. 123, 21 Pac. (2d) 65, was sustained in *Griffiths vs. Thrasher,* 95 Mont. 210, 26 Pac. (2d) 995. In the latter case plaintiff sued to foreclose a chattel mortgage. The defense was that the period for the time of payment of certain of the notes had been extended by an oral agreement. The proof was that the defendant had actually paid, as an independent consideration, the sum of $1000.00 for the extension of time and the Montana Supreme Court held that there was in fact an executed oral agreement for the extension of time. However, the court re-affirmed the doctrine laid down in Continental Oil Co. vs. Bell and held that there was actually a modification accompanied by a new and adequate consideration. In the course of the opinion, however, the Montana Supreme Court pointed out that the defendant was not seeking a rescission of the contract but actually relying upon it affirmatively and suing for damages resulting from an alleged fraud. The court said, on page 228 of the opinion:

> "However, it does not appear from the pleading that defendant is seeking a rescission of the contract; in fact, it affirmatively appears that she elected to affirm the contract and sue for damages resulting from alleged fraud."

It was held in *Armington vs. Stelle,* 27 Mont. 13, 69 Pac. 115, that a subsequent oral agreement between the parties to a written sublease of a mining claim to

the effect that in case the sublessor should buy the property the lease would be extended, was void, being merely an executory agreement without consideration.

An unexecuted oral agreement, the effect of which was to alter the terms of a promissory note by extending the time of payment and changing the amount due constituted no defense to the enforcement of the note, and evidence tending to prove the agreement was improperly admitted.

Lish vs. Martin, 55 Mont. 582,
179 Pac. 826.

Parol evidence of an unexecuted oral agreement offered against a tenant under a written lease that he would surrender the lease and vacate the premises as soon as the landlord could procure a new tenant was inadmissible.

Quong vs. McEvoy, 77 Mont. 99,
224 Pac. 266.

The case of Griffiths vs. Thrasher, 95 Mont. 210, 26 Pac. (2d) 995, is the leading Montana case on the matter of modification of a written contract by an executed oral agreement and it clearly requires that an independent consideration shall be paid and, in conformity with Continental Oil Co. vs. Bell, holds that the executed oral agreement must be separate and distinct from the terms of the written contract and entirely collateral in nature.

Certainly where a man takes a contract to clear 50 acres a mutual agreement to stop at 24 acres is neither

collateral to nor independent from the original agreement. It is simply an offer to prove that the parties agreed upon 24 acres instead of 50 acres and without any consideration for the agreement. It would be no different from a situation where a contractor contracted to build a five story building and then stopped at two stories upon the theory that the owner of the building had agreed that he need not go any further. It is most respectfully submitted therefore that the evidence of the conversation between Mr. Maehl and Strickland was inadmissible first, because it was made by Strickland without showing his authority therefore and second, because it is clear violation of the parol evidence rule.

This being true, and since it is uncontradicted that Barnard-Curtiss Company advanced Maehl $4779.84 (R. 240) during the time while Maehl was clearing 24 acres and partially clearing 12 additional acres, and uncontradicted that Barnard-Curtiss Company expended an additional $6862.85 in completing the clearing under that written contract, and since these two items total $11,642.69, and since it is equally clear that had Maehl finished the 50 acres he would have received only $5000.00, Barnard-Curtiss Company was damaged to the extent of $6642.69 on its counterclaim under the written contract.

QUESTION 6

The last question raised by the defendant has to do with its motion for a reference (R. 56). The motion is based upon the provisions of Rule 53(b) of the Rules of Civil Procedure of the District Courts of the United States. The rule reads as follows:

> "(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; . . . ."

The motion is supported by the affidavit of Howard Toole, one of the Attorneys for the defendant, stating the reasons for the motion.

The motion was timely made and it is submitted that the issues in this cause were actually too complicated to be passed upon intelligibly by a jury. The plaintiff had seven causes of action in his complaint, to-wit:

1. An alleged oral contract for clearing.
2. An alleged oral contract for grubbing.
3. An alleged oral contract for furnishing 6000 stulls which was later dismissed.
4. An alleged oral contract on quantum meruit for hauling men to the West Fork road camp of the defendant.
5. An alleged oral contract on quantum meruit for hauling men to the Flint Creek dam job.
6. An alleged oral contract for an increase in wages on the quantum meruit, and
7. An alleged oral contract for furnishing tools to the defendant.

The defendant denied all of the seven alleged contracts and counterclaimed:

1. For damages for breach of an oral contract to clear 6.98 acres of land on the damsite (later dismissed).

2. For damages for breach of a written contract for clearing 50 acres on the reservoir site.

During all of the time Maehl was working as a foreman on the time books and the Works Progress Administration assignment slip and was not only working on the clearing but also hauling men and working on the camp site, all simultaneously.

It is submitted that no jury could pass upon the nine claims involved with any degree of intelligence all of which is evidenced by the verdict (R. 357) giving the plaintiff $3368.91.

Counsel for the defendant objected to the form of the verdict and it is impossible in this record to arrive at any figure upon which the verdict might be said to rest.

CONCLUSION

The appellant herein most respectfully submits to this court:

First, that Metcalf should have been joined as a party to this action under Rule 14 and Rule 22 of the Rules of Civil Procedure on the motion of the defendant.

Second, that the plaintiff Maehl failed to make a

case for the jury (a) because he failed to make any proof sufficient to justify the court in finding that any contract for clearing or for grubbing or for wages was ever made by the defendant; (b) even if the meager proof submitted was sufficient to go to a jury, it is uncontradicted that the contract, if any, included Metcalf and there was a fatal variance between the pleadings and the proof in that the action was brought by Maehl alone and the proof showed conclusively that Metcalf was a party to the contract, if any.

Third, that the written contract for clearing 50 acres alleged in defendant's second counterclaim was admittedly made and that it was error for the court to permit Maehl to offer testimony of mutual cancellation in that such testimony was inadmissible under the parol evidence rule.

Fourth, that there was no proof whatsoever in Maehl's sixth cause of action for an increase of wages.

Fifth, that the cause was too complicated as set up by the pleadings to justify submission thereof to a jury for a general verdict and the same should have been referred to a master.

Sixth, that the court should have sustained defendant's motion for a directed verdict on the first, second and sixth causes of action (R. 353-354) and that the court should have sustained defendant's motion for the direction of a general verdict in the amount of $3320.09, that being the uncontradicted amount paid out by the defendant in excess of any amounts which

Maehl could have earned had he had the contracts alleged in the complaint.

Respectfully submitted.

Howard Locke

W. J. Brooms

Attorneys for Appellant.

Service of the foregoing Brief and receipt of three copies thereof accepted this ..... day of April, 1940.

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Attorneys for Appellee.

No. 9442

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

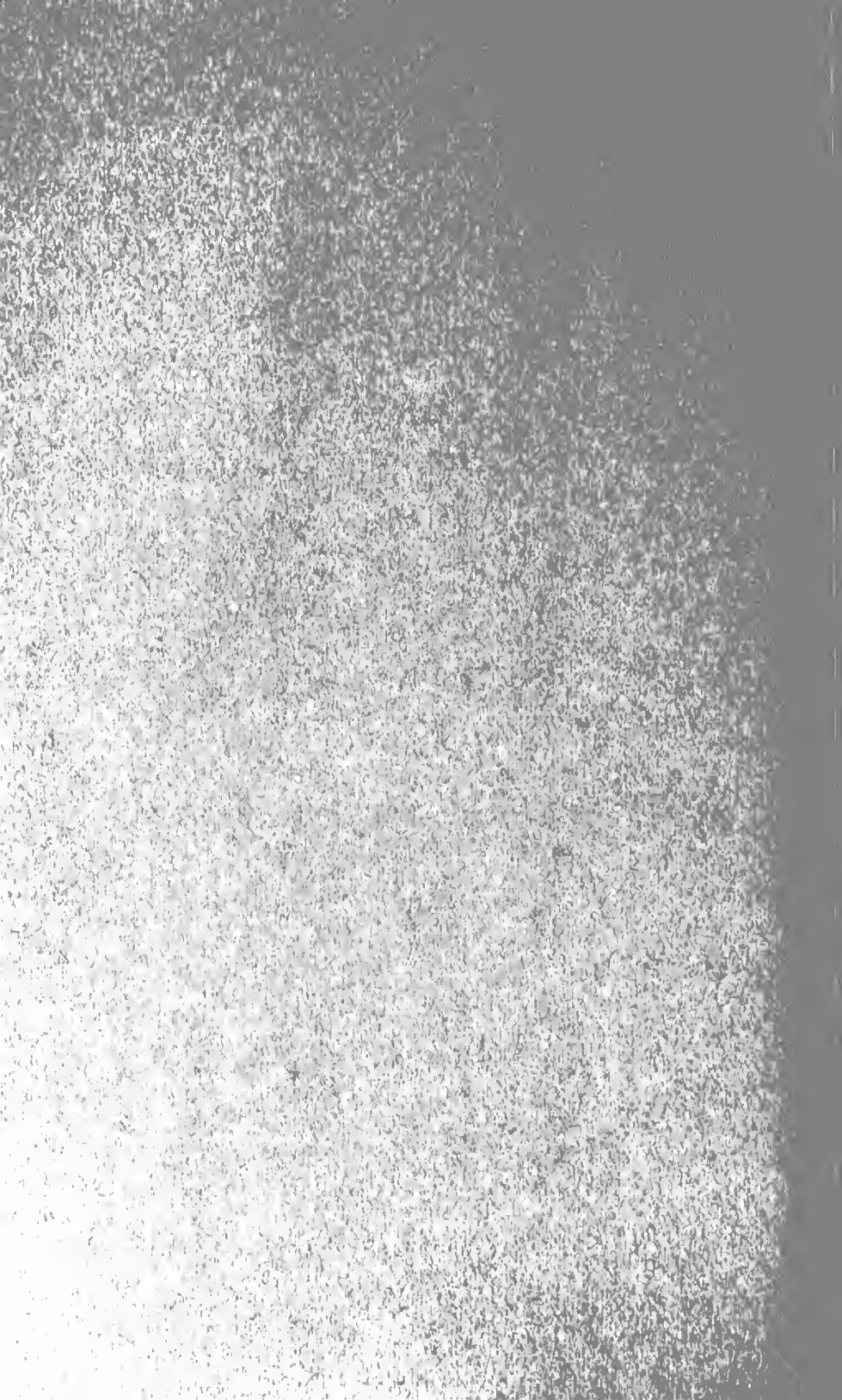
Brief of Appellee

Russell E. Smith
Kendrick Smith
J. J. McDonald
Attorneys for Appellee.

Upon Appeal from The District Court of The United States for The District of Montana.

Filed .....

.....Clerk



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CITATIONS (Continued)

GENERAL FAILURE OF DEFENDANT-APPELLANT TO COMPLY WITH RULES U. S. C. C. A., RULE 24, 2 (d).

Summary: Defendant-appellant's failure to set forth each specification or assignment of error preceding the argument addressed to it, as required by Rules U. S. C. C. A., Rule 24, 2(d), is sufficient to permit this Court to disgregard all questions sought to be raised.

Preliminary to any discussions of the points and questions sought to be presented by defendant-appellant, we wish to call the court's attention to the failure of the defendant to comply with the rules of this court. Defendant filed a "Statement of Points", incorporated in the Record, setting forth seven points. (R. 374). In its brief (pp. 2-4) defendant has set forth six "Questions Presented", amplifying the points somewhat but omitting therefrom points 1 and 7 as made in the "Statement of Points". After a statement of the case (Brief, pp. 5-13), defendant states: (Brief, p. 13)

> "Specifications of Errors To Be Urged."
>
> "The appellant will reply upon all points set forth in its statement of points (R. 374) excepting only point No. 1."

Thereafter defendant makes a preliminary argument and then takes up the "Questions Presented", six in number under four main subdivisions. (Brief, pp. 19, 25, 53, 60). Nowhere in the preliminary argument or in the four main subdivisions of argument is there any attempt to set forth the substance or the text of the specifications of error or the questions presented

preceding the argument addressed to it. The defendant has clearly violated the requirement of Rule 24, 2(d) of the Rules U. S. C. C. A., that appellant's brief contain:

> "A specification by number of such of the assigned errors as are to be relied upon, with reference to the pages of the record where the assignments appear. Thereafter each such assignment of error shall be printed in full preceding the argument addressed to it. Where the specified error is more than two printed pages in length, it may be summarized before the argument addressed to it, in which event the specified assignment must be printed in full in an appendix. The argument need not be arranged in the order of the number of the specified assignments."

This court has definitely announced that this rule must be strictly complied with.

> *Gripton v. Richardson,* (C.C.A. 9), 82 F. (2d) 313;
> *Gelberg v. Richardson,* (C.C.A. 9), 82 F. (2d) 314;
> *Berry v. Earling,* (C.C.A. 9), 82 F. (2d) 317;
> *Hultman v. Tevis,* (C.C.A. 9), 82 F. (2d) 940.

This court may disregard the entire specifications of error made by the defendant.

JOINDER OF METCALF AS A THIRD PARTY WAS PROPERLY DENIED (Defendant's first question).

Summary: Defendant's motion to join Metcalf was patently made under Rule 14(a), without any showing that Metcalf was or could be liable to defendant or plaintiff for any part of plaintiff's claim against de-

fendant. No showing is here made of abuse of discretion in denying the motion. Defendant was in no position to invoke protection under Rule 22(1). Therefore, the motion was properly denied. (R. 55)

Defendant has urged in its brief (pp. 19-25) that the motion was made under Rule 14(a) and Rule 22(1) of the Rules of Civil Procedure for the District Courts of the United States, adopted pursuant to the Act of June 19, 1934, C. 651 (48 Stat. 1064; 28 U. S. C. A. secs. 723 b, 723c), and effective September 1, 1939. (Rule 86). Defendant has made no effort to distinguish between the two Rules and proceeds upon the apparent presumption that they are alike in scope, character and coverage. Because the two Rules are so entirely diffrent as to procedure and coverage, we shall discuss them separately.

Rule 14(a) provides, so far as here pertinent:

> "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action *who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.* If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counter-claims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as proviled in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." (Italics supplied).

Defendant's answer was served on October 1, 1938 (R. 30). Thereafter on April 11, 1939, (R. 54) defendant filed its motion to join Metcalf as a third party. The motion prayed for an order, on five days' notice to plaintiff,

> "for leave to serve summons and complaint in this action upon C. A. Metcalf, an individual residing in Granite County, Montana, within the jurdisdiction of this Court, said C. A. Metcalf being a person *who is not a party to this action but who is or may be liable to this defendant or to the plaintiff for all or part of the claim of the plaintiff Ernest Maehl against this defendant,* or liable to this defendant on its counter-claim against the plaintiff Ernest Maehl." (Italics supplied). (R. 38-39)

We call the court's attention to the italicised portions of the rule and the motion. The similarity is at once apparent. Moreover the motion to secure leave of court was made after answer and after notice to plaintiff. The defendant patently based its motion upon the provisions of Rule 14(a).

Two reasons sustain the ruling of the district court in denying the motion. No showing was made that Metcalf

> "is or may be liable to him (defendant) or to the plaintiff for all or a part of the plaintiff's claim against him (defendant)." Rule 14(a).

The motion made no showing whatever that Metcalf was or could be liable to the plaintiff or to the defandant for any part of the plaintiff's claim against the defendant. Exhibit D (R. 42) and Exhibit E (R. 48) attached to the motion show that Metcalf had instituted two suits in the state courts against Barnard-Curtiss

Company. One action was on a contract, and alternatively in quantum meriut, for the clearing and grubbing of certain lands; the other was on a contract, or alternatively in quantum meriut, for the delivery of stulls. Two of the counts in plaintiff's complaint covered practically the same subject matter, but plaintiff Maehl alleged that the contracts were between him and the defendant. The question presented therefore was one where the defendant feared there might be a possible double or multiple liability against it. In fact the motion affirmatively demonstrated the inapplicability of the provisions of Rule 14(a). There was an entire absence of any attempt to show that Metcalf was or could be liable to Barnard-Curtiss Company or to Maehl for any part of Maehl's claim against Barnard-Curtiss Company. For this reason alone the court properly overruled the motion. The cases cited by defandant (Brief, pp. 23-24) on Rule 14 show precisely the ordinary case for third-party interpleader, i. e., where the defendant seeks to bring in an alleged joint tort feasor or a party alleged to be principally liable to plaintiff.

Defendant's position under Rule 14(a) is not improved by the assertion in its motion that Metcalf is "liable to this defendant on its counterclaim against the plaintiff Ernest Maehl." (R. 39) By defendant's answer, filed before the motion, a counterclaim was set up against Ernest Maehl alone for the breach of a written contract solely between himself and Barnard-Curtiss Company. (R. 26-28). The motion does not

show how or in what possible manner Metcalf could be liable to defendant on this counterclaim. Defendant glossed over the matter and the lower court properly ignored it.

For a second reason defendant may not rely upon Rule 14(a). Leave to bring in a third party under Rule 14(a) is not a matter of right, but rests in the discretion of the court.

> *Tullgren v. Jasper* (D. C. Md.), 27 F. Supp. 413, 418;
> *McPherrin v. Hartford Fire Insurance Co. v. Phoenix Insurance Co.,* (D. C. Omaha), 64 Dept. of Justice Bull. 35.

In *General Taxicab Association v. Henrietta C. O'Shea*, 109 F. (2d) 671 (C.C. A. D .C.) plaintiff sued for injuries arising from the alleged negligence of defendant in operating a "General Cab". Defendants moved the court to implead as third party defendants the owners and operators of a "Diamond Cab" in which plaintiff was riding and submitted a proposed third-party complaint charging the third-party defendants with negligence and asking that judgment, if any, be entered against them. Upon plaintiff's declining to amend, the motion was denied. After reviewing the source authorities and constructions of comparable rules, the court declared: (P. 673)

> "Against this background of statutes and decisions, the Supreme Court, in framing Rule 14 (a), chose the language 'a defendant may move . . . *for leave* as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action . . .,' and the language '*If* the motion is

granted . . .' (Italics supplied). We think there can be no doubt that it was thus intended to make the impleading of third parties in the Federal practice discretionary with the trial court. See 1 Moore, *op. cit. supra,* 741: 'Whether a party to an action shall be allowed to implead an additional party rests in the discretion of the court. This is in accord with the English, New York and Wisconsin practices.'

"With impleader a matter within the discretion of the trial court we could find error in the instant case only upon a theory that the overruling of the motion to implead third parties was an abuse of discretion. We find nothing in the present record indicative of an abuse—especially since neither the appellee, nor even the appellants themselves, asserted a cause of action against the proposed third-party defendants."

And here, neither the defendant Barnard-Curtiss Company or Ernest Maehl assert any cause of action against Metcalf. The defendant has not shown nor made any real effort to show an abuse of discretion.

Another matter which unquestionably influenced the court's discretion is this: The motion asserted that the Metcalf suits, then pending in the state court, covered some of the same matters involved in this case. Nowhere does the record suggest that any steps had been taken to enjoin the litigation in the state court, as was done in *Standard Surety & Casualty Co. of New York v. Baker,* (C.C.A. 8) 105 F. (2d) 578. And as a matter of fact no such steps were taken in the Federal Court. If under these circumstances the court had granted the motion, then the State Court and the Federal Court, so far as Metcalf is concerned, would have been exer-

cising concurrent jurisdiction over the same matter, with the resulting troublesome questions of jurisdiction. If the State Court had rendered a decision prior to the determination in the Federal Court, we would have the unusual spectacle of a Federal Court trying to determine to what extent it was bound by the decision of a State Court in a case in which both courts were exercising jurisdiction. Since the relief asked by appellant would not have stayed or in anywise interfered with the Metcalf suits pending in the State Court, the Federal Court here in its discretion was warranted in refusing to grant the motion.

Defendant now urges that its motion was also made under Rule 22 (1). Defendant makes the unwarranted assertion that Metcalf "was claiming the same fund." (Brief, p. 25) . No fund was shown to exist. At best the statement is an inadvertent one. It has been already noted that a motion was made, leave of court asked, notice given to plaintiff, and the motion grounded upon the assertion that Metcalf "is or may be liable to this defendant or to the plaintiff for all or part of the claim of the plaintiff Ernest Maehl against this defendant." In other words the motion was patently made and predicated upon the provisions not of Rule 22 (1) but of Rule 14 (a). Having proceeded under Rule 14 (a) the defendant is in no position to put the District Court in error by now invoking the protection of Rule 22 (1).

Indeed, it is a most strange anomaly for counsel for

defendant to urge alleged error of the District Court when it is so obvious that counsel are attempting to rectify their own oversight. The pertinent portions of Rule 22 (1) have been quoted by defendant, but because of an apparent printer's error the correct quotation is here given:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20."

A defendant, under this Rule, "who is or may be exposed to double or multiple liability," may obtain interpleader of the claimants *by way of cross-claim or counterclaim.* Defendant's answer was filed October 1, 1938 (R. 32) containing two counterclaims against the plaintiff Maehl *but no cross-claims against Metcalf.* On April 11, 1939, the motion for leave to make Metcalf a third party was filed. (R. 54) Meantime the suits of Metcalf against Barnard-Curtiss Company had been filed in the state district court. The two actions were filed about July 20, 1938, the date appearing up-

on each verification made before the clerk of the district court. (R. 48, 51.) Indeed, we believe that counsel for defendant will freely admit that defendant had knowledge of the Metcalf claims and suits long before the defendant filed its answer in this case.

After the filing of its answer October 1, 1938, and until the filing of its third-party motion, defendant made no effort to amend its pleadings to set up a cross-claim against Metcalf.

Under Rule 15 (a) such an amendment of the answer could have been made as a matter of course prior to April 3, 1939, when the plaintiff's reply was served. (R. 37)

> "(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Defendant made not effort to amend its answer in any way. Nor did the defendant at any time thereafter seek leave of court to amend its answer. The third-party motion, made as it was under Rule 14 (a), asked leave "to serve summons and complaint in this action" upon Metcalf. Not even the form of a proposed complaint was presented to the court as an exhibit or otherwise.

Clearly the defendant never in any way sought to

amend its answer to set up a cross-claim against Metcalf. Defendant has proceeded upon Rule 14 (a) and improperly asserts that error was committed as to, and under, Rule 22 (1). As well might defendant assert that the district court improperly and erroneously refused to permit an amendment to defendant's answer. Neither interpleader under Rule 22 (1) nor an amendment was ever sought and the court may not be put in error for denying what was never requested.

The cases, cited by defendant, construing Rule 22 (1) are not applicable. In *Standard Surety & Casualty Co. of New York v. Baker* (C. C. A. 8) 105 F. (2d) 578, the plaintiff by its complaint *joined* as defendants all claimants making multiple claims.

Defendant has sought to put the district court in error *nunc pro tunc* because it is asserted that the *evidence at the trial* showed Maehl and Metcalf were claiming under the same contract. (Brief, p. 19). Even were this assertion correct (we shall later show it incorrect), it was not made in the motion and the later alleged discovery of the point affords defendant no comfort.

DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON PLAINTIFF'S CAUSES OF ACTION NUMBERED 1, 2, AND 6, WAS PROPERLY OVERRULED BY THE COURT. (Defendant's second, third and fourth questions.)

Summary: The evidence, which on a motion for directed verdict must be viewed in a light most favor-

able to plaintiff, shows: (a) as to first cause of action, that there was an oral contract between plaintiff alone and defendant for clearing the reservoir site and grubbing the dam site; (b) as to the second cause of action, that there was an oral contract between plaintiff alone and defendant for the grubbing of a "borrow pit", that there was no material variance between the pleading of an agreed price and the proof of a reasonable price, and that the work was performed without any payment therefor to plaintiff; and (c) as to the sixth cause of action, that there was proof of the reasonable value of plaintiff's services, rendered at defendant's request.

Preliminary to a discussion of the evidence relating to the three causes of action, we refer to an axiomatic rule. On motion for a directed verdict, the evidence must be considered most favorably to the opponent of the motion.

> *Whitney Co. v. Johnson,* (C.C.A. 9) 14 F. (2d) 24;
> *Port Angeles Western R. Co. v. Thomas,* (C.C.A. 9), 36 F. (2d) 210, 211;
> *Northwestern Pac. R. Co. v. Fiedler,* (C.C.A. 9), 52 F. (2d) 400, 402.
> *Brownlee v. Mutual Ben. Health & Acc. Ass'n.,* (C.C.A. 9) 29 F. (2d) 71, 76:
> "A motion for a directed verdict, like a motion for nonsuit, is in the nature of a demurrer to the evidence. In its determination the evidence upon the part of the plaintiff must be accepted as true, and every proper inference or deduction therefrom taken most strongly in favor of the plaintiff."

A. Defendant's chief contention, apparently is that

Maehl's first cause of action, for clearing 118 acres of a reservoir site, could not be sustained because, even if a contract were proven, it was a contract involving Maehl and Metcalf, jointly as one party, and that Maehl could not sue alone upon the contract.

On the review of the testimony defendant graciously restricts itself to the evidence offered by the plaintiff. (Brief, p. 26). The analysis thereupon made by defendant of this evidence does not give the true picture and a correct analysis shows the error of the conclusions reached by defendant.

1. *Preliminary negotiations.*

In 1935 the two Barnards, Metcalf and Maehl went to the site of the dam on the East Fork of Rock Creek. (R. 166-167). At that time it was the intention of Maehl to do the work together with Metcalf but all conversation about the job was between Ernest Maehl and Jim Barnard. (R. 167-168). The price asked at time was $100.00 per acre and Jim Barnard was advised he could put in his bid on the project accordingly. (R. 63-64). At that time the Barnard-Curtiss Company did not make the successful low bid on this Montana Water Conservation Board project. (R. 64). Nothing further was done until the summer of 1936.

2. *The oral contract of 1936:*

On June 23rd or 24, 1936, Maehl was visited again by Jim Barnard alone (R. 66). Maehl testified:

> "Q. Will you tell the Court and the jury what the second conversation that you had with Mr. Barnard was?

"A. Jim Barnard come to me and we was just getting ready to run concrete and he said I am going to make another bid on this dam and he wanted to know if I would stay with my agreements same as I made before and I told him I would and he says there is three acres of grubbing which was not listed the first time. He wanted to know if I could go up and look it over once more and I told him I didn't think it was necessary and rather than go up I told him I would do the three acres regardless of cost.

"Q. Was anything said at that time about the price that was to be paid for the clearing?

"A. Yes, I said I would clear the same for $100.00 an acre.

"Q. Did you at that time refer to the conversation which you had previously had with Mr. Barnard?

"A. Yes sir.

"Q. And what was said in that connection?

"A. Wasn't anything said. I just took it that we would go ahead.

"Mr. Toole: I move that the answer be stricken, —that nothing was said. I just took it that we would go ahead.

"The Court: Denied. It may be important to the case.

"Mr. Smith: Just tell us now if you can, what if anything was said about the conversation you had previously had.

"A. Nothing more than that I would clear it at that price . . . same price as what we had talked over before." (R. 66, 67).

On cross-examination Maehl testified:

"A. He wanted to know if I would stay with that bid I made on the clearing.

"Q. And what else?

"A. And he said as soon as he found out he had the bid he would notify me and he wanted the dam

site cleared before anything else so we cleared the dam site.

"Q. I am asking you now just about the conversation that took place out on the West Fork.

"A. That was all then.

"Q. That was all he said?

"A. If I would take my bid that I give him the time before and do that clearing and I said I would stay with my bid.

"Q. And that is all that was said?

"A. Just as near as I remember.

"Q. Then did Mr. Barnard leave there at that time?

"A. Yes.

"Q. And have you now told us everything that was said between you and J. A. Barnard with respect to the clearing of the reservoir and the dam site on the West Fork dam up to the time when you started to work clearing the dam site?

"A. Well, he did say there was three acres of grubbing to be done on the dam site and wanted to know if I wanted to look at it and give him an estimate. It was hard to get away. I said I would rather do it for nothing so made the suggestion that I would do the three acres of grubbing without any extra charge.

"Q. Well, had anything been said in 1935 about the dam site? A. No sir." (R. 118-119).

"Q. And you say Mr. Barnard came out on the West Fork job—that was a road job—and said 'Maehl will you stand by the agreement you made last year?' I believe that's what you said?

"A. Yes sir.

"Q. And you said 'Yes'? A. Yes.

"Q. And that was all that was said?

"A. That's all.

"Q. Sir? A. That was all.

"Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?

"A. No.

"Q. You and Metcalf never went together to do the clearing, did you? A. No we didn't." (R. 169)

3. *Notice given to Maehl:*

After Barnard-Curtiss Company secured the state contract for the East Fork of Rock Creek job, Jim Barnard directed his brother Bob "to have Ernest Maehl go up on the damsite clearing and get it started quickly." (R. 71) Maehl was so notified. (R. 73, 119)

4. *Work begun by Maehl.*

Pursuant to notice given him Maehl started work with a crew of men and started clearing first on the damsite. (R. 76). This was August 24, 1936 (R. 121) Metcalf was employed by Maehl in this work (R. 79) but did not come to work until the 9th of October, 1936, when 5 acres outside of the damsite had been cleared. (R. 80). The work was completed January 15, 1937 (R. 85), although Maehl was sick and hospitalized for eighteen days in November preceding. (R. 79).

From this summary analysis of Maehl's testimony it is clearly apparent that there was more than sufficient evidence to go to the jury that there was a contract and that the contract was with Maehl directly and alone. Maehl frankly admitted that in the preliminary 1935 negotiations he made an offer to do the work which contemplated that Metcalf would be in with him. But this was not the situation in 1936. In that year Jim Barnard came to see *Maehl* alone and asked for what Maehl would do the work including some extra grubbing. The extra grubbing was no part of

the preliminary arrangement in 1935. The substance of the 1936 conversation was that Maehl would do the work, including the extra grubbing, at the price which had been named in the preliminary negotiations. In other words there was a reference to the 1935 negotiations for the purpose of determining the price per acre for the clearing and damsite grubbing. Metcalf had no part in this job except as a foreman.

> "Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?
>
> "A. No.
>
> "Q. You and Metcalf never went together to do the clearing, did you?
>
> "A. No we didn't." (R. 169).

And the jury had sufficient evidence before it to so find.

On the law problem defendant has gone to great pains to cite authorities to the effect that an action to enforce a joint right under a contract must be brought by or in the name of all surviving abligees. Assuming the validity of the argument it has no application here. There was more than sufficint evidence given by the plaintiff to show that the contract was between himself and Barnard-Curtiss Company. Indeed defendant makes no effort to apply the rule announced in *Montana-Dakota Power Co. v. Johnson,* 95 Mont. 16, 23 P. (2d) 956, and quoted by defendant. (Brief, p. 33)

> ". . . the mutual assent essential to the formation of a contract must be gathered from their outward expressions and acts, not those undisclosed."

The outward acts and expressions of Jim Barnard in

1936, coupled with the preliminary negotiation in 1935, were related by the plaintiff. Nowhere therein was there any suggetion or act to indicate a purpose on the part of Barnard-Curtiss Company to have Metcalf a party to contract. Maehl was interviewed and Maehl was notified to get a crew and start work. The jury was properly allowed to determine whether there was a contract with Maehl alone.

We do not contest the rule that "an offer can be accepted only by an offeree" (Brief, p. 35) or the rule that if an individual accepts an offer meant for another or if he falsely represents himself to be the offeree, the contract is void. (Brief, p. 39). But there was ample and sufficient evidence for the jury to find an oral contract between Maehl and Barnard-Curtiss Company. Defendant made no effort to show that it made a contract with *Maehl and Metcalf*. Defendant by its answer generally denied the contract. (R. 21); J. A. Barnard, actual managing officer of defendant (R. 188) denied the making of the contract (R. 197); and Metcalf himself testified that Barnard-Curtiss Company denied his claim (R. 292). We have then the anomoly of the defendant urging that it had made no contract, neither with Maehl or Metcalf, and at the same time urging that Maehl should suffer an adverse directed verdict because the contract was between himself and Metcalf and Barnard-Curtiss Company. At least defendant has tried to torture Maehl's testimony to show he was only one of two joint obligees. De-

fendant does not, and dares not, go to the extent of saying Maehl falsely represented himself to be the sole obligee. Defendant satisfies itself by denying all obligation to anyone. Surely the jury was properly allowed to determine from "the outward expressions and acts" whether there was a contract between plaintiff and defendant.

In preliminary argument defendant urged there were two or three "indisputable items" of evidence inconsistent with the existence of a contract (Brief, 16). The first is Exhibit 2 (improperly described as Exhibit 1 in defendant's Brief, page 16) an assignment slip given to Maehl by the W. P. A. (R. 130-131). R. W. Barnard explained this by saying:

> "Well it is a National Re-employment slip; every man had to have a slip and the number that he worked on the job." (R. 257)

And Maehl further explained:

> "Q. Do you know, Mr. Maehl, what, if anything, the purpose was in paying you 85 cents an hour during the hours that you worked on the job?
>
> "Mr. Toole: That is objected to. The fact speaks for itself. It would call for a conclusion.
>
> "Mr. Smith: Well, the counsel went into that matter.
>
> "The Court: Overruled.
>
> "Mr. Toole: Note the exception.
>
> "A. I don't know any more than that they had to carry me on the payroll. That's all I know about it.
>
> "Q. Did you ever have any conversation with Mr. Barnard about being carried on the payroll?
>
> "A. They said they had to carry me on the payroll.

"Q. And is that all you know about that?
"A. That's all I know about that." (R. 148-149)

Even more significant is the stipulation made by defendant's counsel that from January 18th until March 15, 1936, Maehl was carried on the payroll. (R. 267). This was during the period when Maehl was working under the written contract for clearing 50 acres. Defendant professes no surprise at Maehl's being carried on the payroll under the 50 acres-written-contract. Defendant can show no inconsistency with the oral contract in Exhibit 2 when there is in fact consistency with the subsequent practice under a written contract. The same is true of defendant's second item of Maehl's being carried upon the payroll at 85 cents per hour upon the basis of a reclassification slip signed by R. W. Barnard after Maehl had protested. According to stipulation between counsel it was agreed that Maehl was carried at such rate on the payroll during the time of the 50-acre written contract. (R. 267). And as to defendant's third item, Maehl carried his own time in his time in accordance with this practice.

B. Defendant's argument as to plaintiff's second cause of action needs little more attention than the scanty discussion given by defendant. This was an alleged oral contract for the grubbing of a "borrow pit" of 20 acres at a price of $65.00 per acre. (R. 5-6), there being a further allegation that the work was done and was "reasonably worth said sum" of $1,300.00. Plaintiff testified that there was no price set for the

work. (R. 87). The trial court thought there was no variance.

> "The Court: The agreement was that they were to pay a reasonable price for the work done.
>
> "Mr. Toole: —not consistent with the pleading.
>
> "The Court: Well, I think there is no material variance here. I don't suppose you are really startled or surprised at this turn.
>
> "Mr. Toole: I am always startled. Objected to upon the ground the witness has not shown himself qualified and competent.
>
> "The Court: He has been grubbing all his life. Objection overruled.
>
> "Mr. Smith: Will you answer the question?
>
> "A. $65.00 an acre, I think is a very reasonable price." (R. 88).

The allegation of the "reasonable worth" of the work done would seem to be sufficient to prevent the evidence from being materially at variance with the complaint. But even if this allegation is not sufficient to raise the alternative issue of quantum meriut, the real effect of the ruling of the court was to allow the issue to go to the jury and the failure to amend did "not affect the result of the trial of these issues." The provisions as to amendments is set forth in Rule 15 (b) as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merts. The court may grant a continuance to enable the objecting party to meet such evidence." (Italics supplied.)

It should be noted that defendant, the objecting party, failed to satisfy the court that defendant would be prejudiced. The mere statement, "I am always startled", was purely personal repartee.

Defendant baldly states that everything urged as to the clearing contract applies to the alleged contract for grubbing the "borrow pit". (Brief, p. 51). This is an obvious overstatement. There is no evidence of Metcalf making any separate claim for this grubbing, nor of Maehl or Metcalf being together in anyway upon this job. The fact of Maehl being upon the payroll has already been explained.

C. Defendant summarily discusses plaintiff's sixth cause of action. (Brief, p. 52). We shall do likewise. The record shows:

> "Mr. Smith: Did you, —this is with respect to the sixth cause of action,—did you perform some services, Mr. Maehl, in building camp on the job at the East Fork?
>
> "A. Yes sir.
>
> "Q. At whose request did you perform those services?
>
> "A. Jim Barnard's.

"Q. And was anything said as to the rate at which you were to be paid?

"A. No, there wasn't.

"Q. What is the going rate, —what was the going rate in Granite County at that time for foremen of camp building crews?

"A. $1.20 an hour." (R. 108).

Instead of getting $1.20 per hour Maehl received only 85 cents per hour, (R. 109) for 423 hours. (R. 108). Defendant's only argument is that Maehl was working under a W. P. A. assignmentship as foreman. This we have already shown was clearly insufficient to negative a separate agreement, contract or claim in quantum meriut.

In concluding this phase of the argument defendant has said:

"That even if such a contract had been made there is not sufficient proof of performance thereof to justify the trial court in submitting the cause to a jury." (Brief, p. 52).

Apparently defendant restricts this conclusion to plaintiff's first cause of action. (Brief, pp. 2-3). Nowhere has defendant urged non-performance. Nowhere has defendant sought to point out a failure to prove performance. In fact, performance was clearly shown from Maehl's testimony:

"Q. Mr. Metcalf kept the time. At the time the 118 acres was cleared was it cleared in the ordinary and usual manner of clearing land?

"A. Yes sir.

"Q. Was any objection ever made to you by anyone that the dam site was not properly cleared?

"Mr. Toole: That's immaterial. I move that the answer to the question just before it be stricken.

"The Court: Overruled. Motion to strike denied.
"Mr. Toole: Exception.
"A. No sir. . .
"Q. And was any objection ever made to you by anyone that the reservoir site was not properly cleared?
"Mr. Toole: Same objection.
"The Court: Overruled.
"Mr. Toole: Exception.
"A. No sir.
"Q. Were you acquainted with the work that was being done there from the time that it started until the time the water was actually turned into the dam? A. Yes sir.
"Q. Was any work ever done in clearing or grubbing this particular 118 acres other than the work done by your men? A. No sir." (R. 85-86)

We respectfully submit that the defendant's motion for a directed verdict on plaintiff's first, second and sixth causes of action was properly overruled. There was more than ample evidence thereon to submit the issues to the jury.

DEFENDANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON ITS SECOND COUNTERCLAIM. (Defendant's Fifth Question)

Summary: Defendant failed to make sufficient uncontradicted proof of breach of the written contract to clear 50 acres to entitle it to a directed verdict for any sum.

The first counterclaim was dismissed by defendant during the course of the trial. (R. 243)

At the close of the evidence, defendant moved:

"Mr. Toole: Now comes the defendant and moves the court to direct a verdict, a general verdict, for

> the defendant and against the plaintiff, in the amount of $3320.09, on the ground and for the reason that the proof shows conclusively that even if all of the contracts pleaded in the complaint were made, and even if all of the services pleaded were rendered, the plaintiff owes an unpaid balance to the defendant on a general verdict—a general accounting between them—in the amount of $3320.09'' (R. 355)

The denial of the motion (R. 355) constitutes the basis for the fifth question presented by defendant. (R. 375). But strangely enough in the discussion of the question the defendant has greatly broadened and expanded the question Indeed, defendant has changed the question and now relies upon an asserted error of the trial court in refusing to strike testimony as to the termination of the written contract. (R. 341-344).

With its designation of the parts of the record to be printed, defendant filed and served a statement of Points on which it ''intends to rely''. (R. 373-376). A part of its sixth question there set forth (R. 376) constitutes the basis of the fifth question as set out in the brief. (Brief, p. 3) and the brief further recites:

''SPECIFICATION OF ERRORS TO BE URGED.

> The appellant will rely upon all of the points set forth in its statement of points (R. 374) excepting only point No. 1.
>
> SUMMARY OF ARGUMENT
>
> It is not thought that the argument can be satisfactorily summarized but the discussion will proceed upon the assignments of errors as they appear in the statement of points relied upon, beginning with point No. 2 (R. 374) and up to and including point No. 7 (R. 376).'' (Brief, p. 13)

After all of this preliminary restriction of the questions and clear announcement, the defendant with ill grace seeks to raise a new question. We ask for this reason alone that this court not consider the point.

Assuming an indulgence granted to defendant, the defendant must first show (as apparently defendant recognized belatedly) error in the admission of evidence as to the termination of the written contract to clear 50 acres. Defendant fails utterly to show error because of its failure to distinguish between *alteration or modification* and *termination* of a written contract. (We agree with defendant that state law controls under the decision in *Erie Railroad Company v. Tompkins,* 304 U. S. 64)

There was not an attempted alteration or modification of the terms of the contract but an agreement between all of the parties, supported by adequate consideration, that the contract was at an end, or terminated or rescinded. Ernest Maehl testified as to the circumstances:

> "A. Mr. Strickland come over to where I was working and he says 'we are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should have been done.' He explained it to me that he had a lot of fellows that were supposed to be truck drivers and Caterpillar drivers that he wanted to keep, he says we would like to take this over now and finish the clearing with these men on account they wanted to hold them for other work. He says 'you ain't making any money over wages anyway.' I says 'that's

right', and he says he had more important work for me to do,—

"Mr. Toole: Will you excuse me, Mr. Maehl. I move that the entire answer—

"The Court: Let the witness finish.

"A. (continued) He said he would like,—that they had other work they didn't have anybody to qualify for it and wanted me to do it and I says 'all right, if you pay us for the tools or return the tools to me and you can take the job over in the morning', which he did. That is all that was said at the time." (R. 341)

"Q. (read by reporter) Now with reference to that conversation, Mr. Maehl, was anything further said at that time between you and Mr. Strickland which you did not tell us about last Tuesday?

"A. He said that the contract was—that we would call it square if I would handle that part of the clearing that was left so as to make a kind of a line—straighten up a kind of a line— it would terminate the contract." (R. 344)

There was here then a clear oral agreement to terminate or end the contract, defendant agreeing to "call it square" and Maehl agreeing to leave his tools, subject to payment or return. There was clearly no alteration or modification but rather an agreement between the parties to terminate or rescind the contract. No substituted method or amount of clearing was assumed by Metcalf. There was no attempt to make a new contract to complete the clearing. The clearing contract was at an end.

The Montana statute, section 7569, Revised Codes of Montana of 1935, providing that a written contract "may be *altered* by a contract in writing or by an

executed oral agreement", has no application to the present situation. Likewise the cases cited by defendant are not in point. A contract may be "extinguished by its rescission." R. C. M. 1935, section 7564. And "a party to a contract may rescind the same . . . by consent of all the other parties." R. C. M. 1935, section 7565. In *Kester v. Nelson,* 92 Mont. 69, 73, 10 P. (2d) 379, the court stated:

> "The right of the parties to an executory contract to terminate it by mutual consent exists independently of any agreement permitting them so to do; and it is immaterial whether such termination be characterized an abandonment, mutual rescission, modification, or waiver. The effect is the same, to discharge the parties from obligations previously assumed. (Ogg v. Herman, 71 Mont. 10, 227 Pac. 476).
>
> " 'Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. However, as a contract is made by the joint will of two parties, it can be rescinded only by the joint will of the two parties. It is obvious that one of the parties can no more rescind the contract, without the other's express or implied assent, than he alone can make it. But if the parties agree to rescind the contract, and each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them.' (6 R. C. L., sec. 304, p. 922.) 'Again, a contract need not be rescinded by an express agreement to that effect. If the parties to a contract make a new and independent agreement concerning the same matter, and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the

latter may be construed to discharge the former.' (Id., sec. 307, p. 923)

"There can be no question but what a contract may be mutually abandoned or modified by the parties at any stage of performance, and each of the parties released from further obligation on account thereof; that it may be accomplished by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties. (Tompkins v. Davidow, 27 Cal. App. 327, 149 Pac. 788; 6 Cal. Jur., p. 382.)"

Admittedly the question there involved was the termination of an oral contract. The plaintiff, asserting a breach, relied exclusively upon R. C. M. 1935, section 7568, which provides:

"A contract not in writing may be altered in any respect by consent of the parties in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration."

Preliminary to the above quoted remarks, the court replied:

"But he overlooks other provisions of our Codes permitting the rescission of a contract by consent of the parties. (Id., secs. 7563, 7565, 7567.) It is expressively provided by section 7565 that a contract may be rescinded by consent of the parties, and recognition thereof is given by sections 7563 and 7567."

Thus the court clearly distinguished between alteration and rescission. And its discussion of the power to terminate demonstrates that the restrictions upon *altering* written or oral contracts, as set forth in R. C. M. 1935, sections 7569 and 7568, has no application to a mutual termination or rescission of contract.

Defendant briefly urges error that Strickland was

not shown to have authority from defendant to deal with Maehl. (Brief, p. 59). In fact defendant's argument totals 12 words, makes no references to the record, cites no authorities, and contents itself with a bald assertion. Indeed, defendant's brief presents no argument and the alleged error is thereby waived, (Rules U. S. C. C. A. 9, Rule 24, 2; *McCarthy v. Ruddock,* (C. C. A. 9) 43 F. (2d) 976), and this Court is at liberty to disregard it (*Forno v. Coyle* (C. C. A. 9) 75 F. (2d) 692, 695). Assuming that the Court desires to consider the question, the record references plentifully show that Strictland was the superintendent in charge for the Barnard-Curtiss Company. (R. 264, 267, 268, 273, 340.) As such, he had the power to enter into the agreement. The Montana court has so declared in *Oscarson v. Grain Growers Ass'n., Inc.*, 84 Mont. 521, 537, 277 Pac. 14:

> " 'No principle of law is more clearly settled than that an agent to whom is intrusted by a corporation the management of its local affairs, whether such agent be designated as president, general manager, or superintendent, may bind his principal by contracts which are necessary, proper, or usual to be made in the ordinary prosecution of its business (citing cases.) The fact that he occupies, by the consent of the board of directors, the position of such an agent, implies, without further proof, the authority to do anything which the corporation itself may do, so long as the act done pertains to the ordinary business of the company. (Citing cases.)' (Trent v. Sherlock, 24 Mont. 255, 61 Pac. 650; Mayger v. St. Louis M. & M. Co., 68 Mont. 492, 219 Pac. 1102)."

DEFENDANT'S MOTION FOR REFERENCE WAS PROPERLY DENIED. (Defendant's Question 6.)

Summary: Under Rule 53(b) a reference was properly denied, the trial court having broad discretion with respect thereto.

Defendant quotes (Brief, p. 60) and relies upon Rule 53(b), of the Rules of Civil Procedure, to support its motion for reference, the defendant clearly recognizing that the action (including its counterclaims for breaches of contract) was at law and not in equity. Defendant does not urge an abuse of discretion by the trial court and clearly under the wording of Rule 53(b) and the decisions thereunder, the granting of reference lies within the court's discretion.

> *Coyner v. United States* (C. C. A. 7), 103 F. (2d) 629, 635.
>
> "We believe that whether the aid of an auditor shall be sought in law cases is ordinarily within the discretion of the trial judge. We are not in position on this appeal to question the discretion of the trial court in referring this case to the auditor. We do believe it is far better practice, except where stress of work or other good cause is shown, for the court to try cases where the determination of the issues is dependent upon the credibility of the witnesses. In this connection, it is pertinent to note Rule 53 of the Rules of Civil Procedure for the District Court of the United States, 28 U. S. C. A. following section 723c, adopted by the Supreme Court of the United States in 1938 and effective at a date subsequent to the reference in the instant case. Rule 53 provides inter alia that 'a reference to a master (includes a referee, an auditor, and an

> examiner) shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . .' "

Defendant makes one further unwarranted assertion that "no jury could pass upon the nine claims involved with any degree of intelligence." (Brief, p. 61). Defendant under-estimates the intelligence of jurors, completely forgets the right of trial by jury and overlooks the provisions of Rule 53e (3):

> "In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report."

In other words a master's report could have been introduced as evidence but plaintiff could thereupon have introduced full and complete testimony in contradiction. The factor of possible duplication and delay was also present to influence the discretion of the court.

CONCLUSION

We respectfully submit that the defendant has shown no error and that an affirmance should be ordered.

Respectfully submitted.

.....

.....

.....

Attorneys for Plaintiff-Appellee.

Service of the foregoing Brief acknowledged this

..... day of ....., 1940.

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Attorneys for Defendant-Appellant.

No. 9442

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

Reply Brief of Appellant

Howard Toole
W. T. Boone
Attorneys for Appellant.

Upon Appeal from The District Court of The United States for The District of Montana.

Filed .....

.....Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
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Reply Brief of Appellant

Howard Toole
W. T. Boone
Attorneys for Appellant.

Upon Appeal from The District Court of The United States for The District of Montana.

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CITATIONS

Cases:

REFERENCE TO SPECIFICATION OF ERRORS

Appellee opens his brief with a discussion of the question as to whether or not Appellant included a proper specification of errors in its brief. It is urged that the specification contained in Appellant's brief is not sufficient and that the Court may disregard the brief on that account.

There has been some uncertainty in connection with specification of errors since the adoption of the new rules for the district courts. The procedure in the district court appears to be a statement of points to be relied upon rather than a specification of error. It might be better practice for counsel to repeat those points in the brief, and certainly counsel does not wish to have his brief disregarded for failing to do so. The form used by Appellant in this case was in conformity with the brief in United States of America vs. Paul W. Harris, Trustee in Bankruptcy, 100 Fed. (2d) 268 wherein the Appellant specified or assigned errors in exactly the same manner as used in the case at bar. We call the Court's attention to the briefs in that case.

To avoid any question in this connection the Appellant specifies errors in the case at bar as follows:

I.

The court erred in denying the motion of the defendant (R. 374) for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the action because his joinder was essential in order

to prevent the defendant being exposed to double or multiple liability and because he was a proper party to the action as shown by the motion and as born out by the evidence.

II.

The court erred in denying defendant's motion for a directed verdict on plaintiff's first cause of action in that there was not sufficient proof of the making of a contract to justify submission of said cause of action to a jury and for the further reason that even if said contract had been made the same was made with Maehl and Metcalf jointly and not singly and there is therefore a fatal variance between the proof and the pleadings, and for the further reason that even if such contract was made, and even if no such variance did exist, the plaintiff failed to prove by any evidence that such contract was executed and carried out by him (R. 353).

III.

The court erred in denying defendant's motion for a directed verdict on plaintiff's second cause of action in that there was not sufficient proof of the making of a contract to justify submission of said cause of action to a jury and for the further reason that even if said contract had been made the same was made with Maehl and Metcalf jointly and not singly and there is therefore a fatal variance between the proof and the pleadings, and for the further reason that even if such contract was made, and even if no such variance did exist, the plaintiff failed to prove by any evidence that

such contract was executed and carried out by him (R. 354).

IV.

The court erred in denying defendant's motion for a directed verdict on plaintiff's sixth cause of action upon the ground and for the reason that there was no proof whatsoever to sustain any claim under said cause of action (R. 354).

V.

The court erred in overruling defendant's objection to the form of the verdict for the reason that if the cause was to go to a jury said jury should have returned separate verdicts on each separate cause of action (R. 359).

VI.

The court erred in denying defendant's motion to direct a general verdict for the defendant and against the plaintiff for the amount of $3320.09 on the ground and for the reason that the proof shows conclusively that even if all of the contracts mentioned in the complaint were made and even if all the services pleaded were rendered plaintiff owes an unpaid balance to the defendant (R. 355).

In support of his suggestion that the Court ought to disregard the entire specification of errors in Appellant's brief the Appellee cites Gripton vs. Richardson, (C.C.A. 9) 82 Fed. (2) 313; Gelberg vs. Richardson, (C.C.A. 9) 82 Fed. (2d) 314; Berry vs. Earling, (C.C.A. 9) 82 Fed. (2d) 317.

In those cases there was no specification of errors whatsoever and those cases were decided prior to the enactment of the new rules. There is a specification, though abbreviated, in the case at bar.

It is not the intention of Appellant to waive any of the errors specified above and it is thought that substantial justice will be accomplished if consideration is given to the errors specified.

The argument in Appellant's brief is broken down into four main sub-divisions which proceed in orderly form with the discussion of each of the questions involved in the action. It was not thought by Appellant that the argument was susceptible of being summarized and it was not thought that any rights would be waived on account of the abbreviated summary of the argument.

Respectfully submitted.

Howard Poole

W. T. Boone

Attorneys for Appellant.

Service on the foregoing Reply Brief and receipt of three copies thereof accepted this ..... day of ....., 1940.

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.....

.....

Attorneys for Appellee.

NO. 9444

United States

Circuit Court of Appeals

For the Ninth Circuit.

C. H. LEONARD,

Appellant,

vs.

SAMUEL R. BENNETT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

NO. 9444

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

MR. ROBERT M. DUNCAN,
Burns, Oregon;

MR. JOHN W. McCULLOCH,
Public Service Building,
Portland, Oregon; and

MR. HUGH L. BIGGS,
Pittock Block,
Portland, Oregon,
for Appellant.

MR. S. J. BISCHOFF,
Public Service Building,
Portland, Oregon; and

MR. PAT H. DONEGAN,
Burns, Oregon,
for Appellee.

DEBTOR'S PETITION

B-23787

For Composition or Extension Under Section 75, Act of March 3, 1933.

To the Honorable James Alger Fee and Claud H. McColloch, Judges of the District Court of the

United States for the District of Oregon, ... Division.

The Petition of Samuel R. Bennett of Burns, in the County of Harney, District, State of Oregon, who is at present employed as a District Grazier by the Division of Grazing of the Department of Interior at Burns:

Respectfully Represents: That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjacent to said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit; and

That such farming operations occur in the county (or counties) of Harney within said judicial district; that he is insolvent (or unable to meet his debts as they mature); and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked A (1, 2, 3, 4, 5), and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked B (1, 2, 3, 4, 5, 6), and verified by your petitioner's oath, contains an accurate inventory of all his property,

both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore Your Petitioner Prays that his petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

SAMUEL R. BENNETT
Debtor

C. B. PHILLIPS
PAT H. DONEGAN
Attorneys for Debtor

In the District Court of the United States for the District of Oregon

November Term, 1938.

Be It Remembered, That on the 22nd day of December, 1938, there was duly filed in the District Court of the United States for the District of Oregon, a Debtor's Petition, in words and figures as follows, to wit: [1*]

United States of America
District of Oregon
County of Harney—ss:

I, Samuel R. Bennett, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements

*Page numbering appearing at foot of page of original certified Transcript of Record.

contained therein are true according to the best of my knowledge, information and belief.

SAMUEL R. BENNETT
Petitioner.

Subscribed and sworn to before me, this 20th day of December, A. D. 1938.

[Seal] ARCHIE WEINSTEIN
Notary Public for Oregon

My Com. expires 4/24/39. [2]

SCHEDULE A-2

CREDITORS HOLDING SECURITIES

Reference to ledger or Voucher	Names of Creditors	Residences if unknown that fact must be stated	Description of securities	When & Where debts were contracted	Value of Securities	Amount of Debts
	Federal Land Bank of Spokane,	Spokane, Washington	First Mortgage on Real Estate App. $10,000.00 (See description in list of assets Schedule B-1)	1930	10,000.00	10,000.00
	C. H. Leonard,	Burns, Oregon	Second Mortgage on Real Estate (Mortgagee claims amount due him to be $9912.00 but this is disputed by debtor) (See description of property in list of assets in Schedule B-1)	None after first mortgage is paid		9912.00 (disputed)
					Disputed.....	9912.00
						10.000.00

SAMUEL R. BENNETT

Petitioner [3]

Samuel R. Bennett

5

SCHEDULE A-3

CREDITORS WHOSE CLAIMS ARE UNSECURED

Reference to Ledger or Voucher	Name of Creditors	Residences	When & Where Contracted	Nature & Consideration of Debt	Amount
	Merle Bennett,	Burns, Oregon	Promisory Note Due 1933		225.00
	Burns Times Herold		1931	Burns Oregon	400.00
	A. A. Bardwell		1932	Burns, Oregon	250.00
				Total	875.00

SAMUEL R. BENNETT
Petitioner [4]

OATH TO SCHEDULE A

United States of America
District of Oregon
County of Harney—ss.

On this 20th day of December A. D. 1938, before me personally came Samuel R. Bennett the person mentioned in and who subscribed to the foregoing Schedule A (1, 2, 3, 4, 5), and who being by me first duly sworn, did declare said Schedule to be a true statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

SAMUEL R. BENNETT

Subscribed and sworn to before me this 20th day of December, 1938.

[Seal] ARCHIE WEINSTEIN,
Notary Public for Oregon

Commission expires April 24, 1939. [5]

SCHEDULE B-1

STATEMENT OF ALL PROPERTY OF BANKRUPT

Real Estate

Location and Description of all real estate owned by Debtor, or held by him	Incumbrances thereon, if any, and dates thereof	Statement of particulars relating thereto	Estimated Value
All of Lots 4 and 5 of Section 17, and E½ of NE¼ of Section 18, in township 23, S. R. 31 E.W.M. The SE¼ of Section 31, in township 19 S. R. 31 E.W.M. Lots 3 and 4 and 5 and the SE¼ NW¼ of Section 6 in township 20 S. R. 31 E.W.M. The E¼ of SW¼, and Lots 3 and 4 in Section 30, in township 23, S. R. 31 E.W.M. The E½ of SW¼ of 8 in township 23 S. R. 31 E.W.M. (save and excepting therefrom Tracts or Lots 2, 3, 4, and 5, consisting of 5 acres each contained therein) all of said lands being in Harney County, Oregon, together with the tenements, hereditaments and appurtenances thereunto belong or in anywise pertaining, including any and all water rights of every kind and description, however evidenced, appurtenant to the same or any part thereof, and any and all dams, ditches and other appliances connected with or pertaining in any way to the irrigation of said lands, or interests therein or rights thereto.	The above lands are incumbered as follows: Federal Land Bank of Spokane, First Mortgagee App $10,000.00 C. H. Leonard, Burns, Oregon Second Mortgagee claims 9,912.00 This amount is disputed by Debtor.		10,000
Lot 11, Block 11 of Bennett's Second Addition to the City of Burns Harney County, Oregon			1,500.00
		Total	11,500.00

SAMUEL R. BENNETT

Petitioner. [6]

SCHEDULE B-2

PERSONAL PROPERTY

A. Cash on hand		None
B. Bills of Exchange Promissory notes, or securities of any description (each to be set out separately.)		None
C. Stock in trade in. . . business of . . . at . . . of the value of		None
D. Household goods and furniture, household stores, wearing apparel, and ornaments of the person, viz:		None
E. Books, prints and pictures, viz:		None
F. Horses, cows, sheep and other animals, (with number of each) viz:	2 Cows, at $50.00—100.00	100.00
	6 Horses at $30.00—180.00	180.00
G. Carriages and other vehicles viz:		None
H. Farming stock and implements of husbandry, viz:		None
I. Shipping and shares in vessels, viz:		None
K. Machinery, fixtures, apparatus, and tools, used in business with the place where each is situated, viz:		None
L. Patents copyrights and trade marks, viz:		None
M. Goods or personal property of any other description, with the place where each is situated, viz:	Debtor is advised and believes that there are some 500 tons of hay cut and stacked upon his lands worth about $4.00 ton	2,000.00
	Total	2,280.00

SAMUEL R. BENNETT

Petitioner [7]

SCHEDULE B-3

CHOSES IN ACTION

A. Debts due petitioner on open account	None
B. Stock in Incorporated companies, interest in joint stock companies and negotiable bonds	None
C. Policies of Insurance	None
D. Unliquidated claims of every nature with their estimated value	None
E. Deposits of money in banking institutions and elsewhere	None
Total	None

SAMUEL R. BENNETT

Petitioner. [8]

SCHEDULE B-4

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

General Interest	Particular Description	Supposed Value of my Interest
Interest in land		None
Personal Property		None
Property in money: Stocks, shares, bonds, annuities, etc.		None
Rights and powers, legacies and bequests		None
Property heretofore converted for benefit of creditors		None
What portion of debtor's property has been conveyed by deed of assignment or otherwise for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor		None

What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy 40.00

Total 40.00

SAMUEL R. BENNETT

Petitioner [9]

SCHEDULE B-5

A PARTICULAR STATEMENT OF THE PROPERTY CLAIMED AS EXEMPTED FROM THE OPERATION OF THE ACTS OF CONGRESS RELATING TO BANKRUPTCY, GIVING EACH ITEM OF PROPERTY, AND ITS VALUATION, AND, IF ANY PORTION OF IT IS REAL ESTATE, ITS LOCATION, DESCRIPTION AND PRESENT USE.

Military uniform, arms and equipments None

Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.
(See State Law)

2 Cows 100.00

6 horses 180.00

Home, Lot 11 of Block 11, Bennett's Second Addition to the City of Burns, Harney County, Oregon 1,500.00

Total 1,780.00

SAMUEL R. BENNETT

Petitioner [10]

SCHEDULE B-6

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage and also of all others which may have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reasons for their custody of the same.

Books ..... None

Deeds ..... None

Papers ..... None

SAMUEL R. BENNETT
Petitioner

OATH TO SCHEDULE B

United States of America
District of Oregon
County of Harney—ss.

On this 20th day of December A. D. 1938 before me personally came Samuel R. Bennett the person mentioned in and who being subscribed to the foregoing Schedule B (1, 2, 3, 4, 5, 6), and who being by me first duly sworn, did declare the said Schedule to be a statement of all his estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

SAMUEL R. BENNETT

Subscribed and sworn to before me this 20th day of December, 1938.

[Seal] ARCHIE WEINSTEIN
Notary Public for Oregon

My commission expires, April 24, 1939.

[Endorsed]: Petition and Schedules Filed December 22, 1938. [11]

And Afterwards, to wit, on the 22nd day of December, 1938, there was duly Filed in said Court, an Order approving the Petition as properly filed, in words and figures as follows, to wit: [12]

District Court of the United States for the District of Oregon.

In Proceedings for a Composition or Extension.

B-23787

In the Matter of

SAMUEL R. BENNETT,

Debtor.

ORDER APPROVING DEBTOR'S PETITION OR ANSWER IN PROCEEDINGS UNDER SECTION 74, OR HIS PETITION IN PROCEEDINGS UNDER SECTION 75.

At Portland, in said district, on the 22nd day of December, A. D. 1938, before the Honorable Claude McColloch, Judge of said Court, the petition of Samuel R. Bennett praying that he be afforded an

opportunity to effect a composition or an extension of time to pay his debts under section ..... of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

Witness, the Honorable Claude McColloch, Judge of said Court, and the seal thereof, at Portland, in said district, on the 22nd day of December, A. D. 1938.

[Seal] G. H. MARSH
Clerk.

[Endorsed]: Filed December 22, 1938. [13]

And Afterwards, to wit, on the 31st day of December, 1938, there was duly Filed in said Court, a Motion of C. H. Leonard to dismiss petition of debtor, and Affidavit of C. H. Leonard attached thereto, in words and figures as follows, to wit: [14]

[Title of District Court and Cause.]

To the Honorable James Alger Fee and Claude McColloch, Judes of the above entitled Court:

MOTION TO DISMISS

Comes now C. H. Leonard, a creditor of the above named debtor, by Robert M. Duncan, his attorney, and respectfully moves for an order dismissing the Petition of the above named debtor, Samuel R. Bennett, filed herein for the purpose and with the intent to effect a composition or extension of time

to pay his debts and the provisions of Section 75 of the Bankruptcy Act; and as grounds for this motion respectfully show and alleges:

I.

That the debtor, Samuel R. Bennett, is not a "farmer", nor in any manner qualified to file a petition under, or invoke the protection of, the provisions of Section 75 of the Bankruptcy Act. (Vol. 11, Sec. 203, U. S. C. A.)

II.

That the petition of the debtor filed herein has not been filed in good faith and is filed for the purpose of hindering and delaying his creditors.

III.

That the allegations of debtors petition, and in particular the items of the schedules thereto attached, are false and fraudulent in that the real property therein described is not in the ownership, possession or control of said debtor, all as more fully appear in the affidavit hereto attached.

That this Motion is based upon the record herein and upon [15] the affidavit of C. H. Leonard hereunto attached and by reference made a part of this Motion.

Respectfully submitted,
ROBERT M. DUNCAN
Burns, Oregon
Attorney for Creditor
C. H. Leonard [16]

State of Oregon
County of Harney—ss.

I, C. H. Leonard, being first duly sworn do depose and say:

(1) That this Affidavit is made in support of a Motion to Dismiss in the Matter of Samuel R. Bennett, Debtor, now pending in the District Court of the United States for the District of Oregon.

(2) That I am a creditor of the said Samuel R. Bennett. That on the 4th day of January, 1938, I filed a Complaint in foreclosure in the Circuit Court of the State of Oregon for Harney County, wherein I was plaintiff and Samuel R. Bennett, sometimes written S. R. Bennett, and Alice Bennett, his wife, individually, and the Bennett Realty Company, a corporation of Burns, Oregon, Samuel R. Bennett, its President, and Alice Bennett, its Secretary, were defendants.

(3) That as shown by the duly verified complaint filed in said cause I prayed for judgment against Samuel R. Bennett and Alice Bennett, jointly and severally, for the principal sum of $9440.29 with interest at 8% per annum from January 1st, 1938. For the further sum of $900.00 attorney fees, and for the costs and disbursements of such suit. That the said judgment constitute a lien, by virtue of valid mortgages upon the following described real property in Harney County, Oregon, to-wit:

Tract I

Lots 3, 4, 5, SE¼ NW¼ Section 6, Twp. 20 SR 31 E. W. M.

Tract II

Lots 4 and 5 Section 17, E½ NE¼ of Section 18 Twp. 23 S. R. 31 E. W. M.

SE¼ Section 31 Twp. 19 S. R. 31, E. W. M.

E½ SW¼, Lots 3 and 4, Section 30 Twp. 23 S. R. 31 E. W. M.

E½ SW¼ Section 8, Twp. 23 S. R. 31 E. W. M. except tracts or lots 2, 3, 4 and 5 of five acres each as the same are plotted upon said tract. Together with all tenements, hereditaments and appurtenances thereunto belonging including all water rights, dams, ditches and other appliances. [17]

(4) That after filing the said Complaint, Summons was duly issued and placed in the hands of the Sheriff of Harney County, Oregon for service on the 4th day of January, 1938, with directions endorsed thereon that Summons and one copy of the Complaint be served upon the said Samuel R. Bennett, Defendant, designated for such service and copies of the Summons only to be served upon all other defendants. That thereafter and on the 6th day of January, 1938, Summons and Complaint were duly and legally served upon Samuel R. Bennett by the Sheriff of Harney County, Oregon and on the 6th day of January, 1938, Summons was served upon Bennett Realty Company, a corpora-

tion, by delivering a copy of such Summons to Samuel R. Bennett, President thereof. That thereafter and on the 8th day of January, 1938, summons was served upon Alice Bennett, the wife of Samuel R. Bennett; each of the services above named and described were made by the Sheriff of Harney County, Oregon and within said Harney County, Oregon.

(5) That the said defendants and each of them failed and neglected to appear and answer or otherwise plead in said cause, and thereafter and on the 26th day of November, 1938 the Plaintiff herein filed in said Court and cause a written Motion for an Order entering the default of the defendants, said Motion being supported by the Affidavit of the Plaintiff, and that thereafter and on the 26th day of November, 1938, the Judge of the said Court duly made and entered of record in said cause an Order of Default against the said Defendants and further made and entered of record a Decree wherein and whereby the Court entered judgment against Samuel R. Bennett and Alice Bennett, his wife, and each of them, in the principal sum of $9,912.13 with accruing interest at 8% per annum from December 1st, 1938, together with the costs and disbursements of such suit. And said decree further provided that the Judgment, as aforesaid, was decreed to be a valid and subsisting and prior lien upon all of the real property described in Paragraph 3 of this Affidavit, and further [18] decreed that the

lien of said Judgment be second to the Mortgage of the Federal Land Bank of Spokane, the principal of the Mortgage to said Land Bank being in the sum of $6,153.10 with accruing interest. That the said Decree further provided for the usual relief and mortgage foreclosure and decreed that the real property described in Paragraph 3 hereof, or so much thereof as may be necessary to satisfy the judgment of Plaintiff, be sold by the Sheriff of Harney County, Oregon under execution, and directed that the Plaintiff may become a competent purchaser at such sale.

(6) That thereafter and on the 28th day of November, 1938 an execution in foreclosure was duly issued out of said Court and cause and placed in the hands of the Sheriff of Harney County, Oregon. That the Sheriff having determined that all personal property had been sold and the proceeds applied upon said Mortgage, as found by the Court, the Sheriff by virtue of said Execution levied upon all of the real property described in Paragraph 3 of this Affidavit and did thereupon give notice of sale thereof by publishing a notice of sale in the Burns Times Herald; the first publication of such notice being on December 2nd, 1938 and weekly thereafter. The last notice to appear in the issue of December 30th, 1938, and by said notice the Sheriff fixed the time and place of sale to be December 31st, 1938 at 10:00 o'clock A. M. at the front door of the Court House in Burns, Harney County,

Oregon and the sale to be to the highest and best bidder for cash. That the Sheriff on the 28th day of November, 1938 caused legal notice of such levy and sale to be posted in three public and conspicuous places in Harney County, Oregon.

(7) That the Debtor herein has listed the debt to the Federal Land Bank of Spokane in the sum of $10,000.00, whereas said Debtor well and truly knew that the amount of said debt was and is $6,153.10 with interest accruing from September 1st, 1938.

(8) That the said Debtor further listed in his said Schedules [19] filed herein the debt of C. H. Leonard in the sum of $9,912.13, with the statement that such debt was disputed by the said Debtor, whereas, in truth and in fact the said Debtor had not disputed the said account and that the said debt was determined by a valid and subsisting Decree and Judgment of the Circuit Court of the State of Oregon for the County of Harney and had been entered after legal service of Summons and the default of the Defendant.

(9) That in the Schedule filed with the Petition of Debtor herein the said Debtor listed as real property belonging to him, on Page 6 thereof, the land described in Paragraph 3 of this Affidavit, whereas, in truth and in fact, the legal title of the said real property described in said Schedule, and as set forth in Paragraph 3 of this Affidavit, Tract I therein described stands in the name of Alice Bennett, the wife of the Debtor, and the remaining

lands described in Tract II stands in the name of Bennett Realty Company, a corporation, and that the only land standing in the name of the Debtor is Lot 11, Block 11 of Bennett's Second Addition to the City of Burns, Oregon. And that the said Debtor makes his residence and home upon the said Lot 11, and that the affiant herein has or claims no interest therein and such lot is not affected by the Decree of foreclosure hereinbefore described.

(10) That the said Debtor, Samuel R. Bennett, is not a farmer within the meaning of Section 75 of the Bankruptcy Act (Section 203 U. S. C. A.), that the said Debtor is a full time employee of the United States Government as District Grazer, District #4, Jordan Valley, Oregon in the Division of Grazing, Department of the Interior of the United States, on a salary of not less than $1800.00 per year and has held this position for a term of approximately eighteen months and that such position is permanent. That the said Debtor is not engaged in farming nor in any branch of agriculture. [20]

That said Samuel R. Bennett, Debtor, is not personally or otherwise engaged and producing products of the soil and is not personally engaged in dairy farming or the production of poultry or live stock or the production of poultry products or live stock products in their manufactured state, and the principal part of the income of said Debtor is derived from his position with the United States Government as hereinbefore alleged, and his income

derived from products of the soil, dairy farming, the production of poultry or live stock or the production of poultry products or live stock products in their manufactured state is either nil or very limited and is in no manner whatsoever connected with the property described in the mortgage foreclosure proceeding hereinbefore set forth. [21]

(11) That Alice Bennett, the wife of said Debtor, is a School Teacher and has been steadily employed since 1931 and is now employed for a nine months term in School District #3 on Poison Creek in Harney County, Oregon at a salary of $95.00 per month. That her earnings during the past seven years have been in excess of $5,000.00.

(12) That included in the mortgages hereinbefore mentioned there appeared Block 51 of the Second Addition to Burns, Oregon, and that the said Block was described in the Complaint hereinbefore mentioned, but that following the filing of Complaint and prior to Decree the improvement on said Block burned; for which insurance was paid in the sum of $1500.00. Thereafter the real property sold for the sum of $1200.00 and the total proceedings were paid to the Federal Land Bank of Spokane and applied upon the first mortgage against the real property hereinbefore described. And for the foregoing reasons reference was not made to said Block as being included in the foreclosure proceeding and the same is not included within the foreclosure Decree.

(13) That Affiant is informed and believes and therefore alleges the fact to be that the Debtor's Petition was filed herein for the sole purpose of hindering and delaying your affiant.

(14) That in November 1930 the said Samuel R. Bennett, Debtor herein, and his wife by agreement independent of the mortgage as well as by the terms of the mortgages hereinbefore referred to delivered the possession of the real property described in Paragraph (3) hereof to Affiant for the purpose of operation and management, and that since said date this affiant has been in the sole and exclusive possession thereof for the purpose of management and operation. That Affiant has cared for and managed the said property, harvested the crops therefrom, has sold the crops and applied the proceeds in the payment of taxes, Federal Land Bank installments and operating expenses, all of which was well known [22] and agreed to by the Debtor herein, and that no question has ever been raised by the said Debtor concerning such management. That in the foreclosure proceeding this Affiant by Affidavit made a full and complete disclosure to the Court and to all parties interested in said proceeding of all sums collected and all disbusements made on account of such management subsequent to the 4th day of January, 1938, and that a like disclosure is shown by the Complaint for prior years, all of which was agreed to by the Debtor herein and that no exception nor objections or question of any nature was ever filed in relation

thereto. That this affiant does not have on hand any personal property of any nature whatsoever belonging to the said Debtor or to any Defendant in said foreclosure proceeding, jointly or severally.

Wherefore, this Affiant prays as in the Motion herein set forth.

C. H. LEONARD

Subscribed and sworn to before me this 29th day of December, 1938.

[Seal] R. M. DUNCAN
Notary Public for Oregon.

My commission expires:

State of Oregon,
County of Harney—ss.

Due and legal service of the foregoing by receipt of duly certified copy thereof, as required by law, is hereby accepted in Harvey County, Oregon, this 29th day of December, 1938.

PAT H. DONEGAN
Attorney for Debtor

[Endorsed]: Filed December 31, 1938. [23]

And afterwards, to wit, on the 25th day of January, 1939, there was duly filed in said Court, an Order of Reference to Conciliation Commissioner, in words and figures as follows, to wit: [24]

[Title of District Court and Cause.]

ORDER OF REFERENCE IN PROCEEDINGS UNDER SECTION 74 OR SECTION 75

Whereas the petition of Samuel R. Bennett, filed in this Court on the 22nd day of December, A. D. 1938, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, having been duly approved by order of this Court on the 22nd day of December, A. D. 1938, it is thereupon ordered that said matter be referred to Richard E. Kriesien, one of the conciliation commissioners of this Court, to take such further proceedings therein as are required by said section; and that the said Samuel R. Bennett shall attend before said conciliation commissioner on the 4th day of February, 1939 at Burns in said District, and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this Court relating to the proceedings under said section.

Witness, the Honorable Claude McColloch, Judge of the said Court, and the seal thereof, at Portland, in said district, on the 25th day of January, A. D. 1939.

[Seal] G. H. MARSH
Clerk

[Endorsed]: Filed January 25, 1939. [25]

And afterwards, to wit, on the 25th day of January, 1939, there was duly filed in said Court, an Order referring to Conciliation Commissioner, motion of C. H. Leonard to dismiss, in words and figures as follows, to wit: [26]

[Title of District Court and Cause.]

January 25, 1939.

The above case having been referred to Richard E. Kriesien, conciliation commissioner, at Burns, Oregon, and C. H. Leonard, a creditor of the above debtor, having filed a motion to dismiss this proceeding, it is ordered that said motion be referred to the said conciliation commissioner for his consideration.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed January 25, 1939. [27]

And afterwards, to wit, on the 6th day of March, 1939, there was duly filed in said Court, an Order of the Conciliation Commissioner on the motion of C. H. Leonard to dismiss, in words and figures as follows, to wit: [28]

[Title of District Court and Cause.]

ORDER AND CERTIFICATION

I, Richard E. Kriesien, Conciliation Commissioner of said County, do hereby certify that in the course of the proceedings in said cause before me, the fol-

lowing question arose pertinent to the said proceedings:

> C. H. Leonard, creditor herein, filed his petition alleging that the debtor, Samuel R. Bennett, is not a farmer, nor in any manner qualified to file a petition under or invoke the protection of the provisions of Section 75 of the Bankruptcy Act.

Upon the above petition C. H. Leonard, a creditor, testified that the debtor is a full time employe, namely: District Grazier, District #4, Jordan Valley, Oregon, of the Division of Grazing, Department of the Interior of the United States and that said debtor is not personally engaged in farming nor does said debtor derive his principal income from farming activities. The debtor, Samuel R. Bennett, testified that during the past eighteen months he has been a full time employe of the United States Government in the capacity of District Grazier, District #4, of the Division of Grazing, Department of Interior on a yearly wage of $1,860.00, and that said wage has been his principal source of income and that he has not been personally engaged in farming during said period. Debtor further testified that if he was successful in effectuating a composition or extension of his debts that he would retain, his employment as District Grazier and hire employes to farm his land or if he could borrow sufficient money that he would return to and operate his farm personally, but that he could not in-

dicate with any degree of certainty when he would be in a position to farm his property personally.

In view of the fact that there was no dispute as to the question of the debtor's employment by the United States government and as debtor testified that his principal source of income was his employment in the Division of Grazing, Department of the Interior of the United States and that he was not personally engaged in farming, the Conciliation Commissioner finds that the debtor is not a farmer as defined and classified by Section 75 of the Bankruptcy Act and now therefore, it is

Ordered, adjudged and decreed, that the petition of C. H. Leonard, a creditor herein, praying for the dismissal of the petition of Samuel R. Bennett, debtor, for a composition or extension under Section 75 of the Bankruptcy Act be and is hereby approved and the petition of Samuel R. Bennett be and is hereby dismissed on the ground and for the reason that said debtor is not a farmer within the meaning of Section 75 of the Bankruptcy Act; and the said question is certified to the Honorable Claude McColloch, Judge of the said Court for his opinion thereon.

Dated at Burns, Oregon, this 28th day of February, 1939.

RICHARD E. KRIESIEN
Conciliation Commissioner
for Harney County

[Endorsed]: Filed March 6, 1939. [29]

And afterwards, to wit, on the 6th day of February, 1939, there was duly filed in said Court, by the Conciliation Commissioner, and on March 27, 1939, by the Clerk, a Notice by the Conciliation Commissioner to creditors of first meeting of creditors, in words and figures as follows, to wit: [30]

[Title of District Court and Cause.]

To the creditors of Samuel R. Bennett of Burns, in the county of Harney, and district aforesaid.

Notice is hereby given that on the 25th day of January, 1939, the petition of the said Samuel R. Bennett, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the Bankruptcy Act, was approved by this court as properly filed under said section; and that the first meeting of his creditors will be held at Burns, in the office of the Conciliation Commissioner, in the Tonawama Building, on the 25th day of February, 1939, at 10:00 o'clock in the forenoon, at which time the said creditors may attend, prove their claims, examine the debtor and transact such other business as may properly come before said meeting.

RICHARD E. KRIESIEN
Conciliation Commissioner

Done and dated at Burns, Oregon, February 6th, 1939.

[Endorsed]: Filed February 6th, 1939 at 4:00 P. M.

[Endorsed]: Filed March 27, 1939. [31]

And afterwards, to wit, on the 25th day of February, 1939, there was duly filed in said Court, by the Conciliation Commissioner, and in the 27th day of March, 1939, by the clerk, Debtor's Proposal for a Composition in words and figures as follows, to wit: [32]

[Title of District Court and Cause.]

DEBTOR'S PROPOSAL FOR A COMPOSITION

Before Honorable Richard E. Kriesien, Conciliation Commissioner to the Creditors of the above named debtor:

Samuel R. Bennett, debtor above named, submits herewith his proposal for a composition and extension on the terms of his indebtedness, as follows, to-wit: That he retain all the property described in his schedules and pay his creditors in the priority to which they are entitled, three years after acceptance and confirmation, the sum of $8,000.00 together with an annual rental therefor in the sum of $575.00 per annum, the first payment to be made one year after confirmation, and thereafter semiannually.

Dated at Burns, Oregon, February 25th, 1939.

(Signed) SAMUEL R. BENNETT

PAT H. DONEGAN

One of Debtor's Attorneys

[Endorsed]: Filed Feb. 25, 1939. By R. E. Kriesien, Conciliation Commissioner for Harney County.

[Endorsed]: Filed March 27, 1939. G. H. Marsh, Clerk. [33]

And afterwards, to wit, on the 20th day of March, 1939, there was duly filed in said Court, by the Conciliation Commissioner, and on March 27, 1939, by the Clerk, petition of debtor to review order of Conciliation Commissioner, in words and figures as follows, to wit: [34]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To Honorable R. E. Kriesien, Conciliation Commissioner for Harney County:

Samuel R. Bennett, debtor above named, respectfully alleges:

1. That by a petition heretofore filed C. H. Leonard alleged that petitioner was not a farmer qualified to file a petition under the provisions of Section 75 of the Amended Bankruptcy Act and praying for dismissal of this proceeding;

2. That a hearing was had thereunder on the 25th day of February, 1939, at the first meeting of creditors, and on the 28th day of February, 1939, the conciliation commissioner herein made an order sustaining the petition of the said C. H. Leonard for the dismissal of debtor's petition on the ground that the said debtor was not a farmer within the meaning of said Section 75 of the Bankruptcy Act. Said order was and is erroneous in that:

a. The aforesaid C. H. Leonard was without authority to file his said petition, and the said conciliation commissioner was without jurisdiction to hear and determine the same, in that the said C. H.

Leonard has failed to file with said conciliation commissioner any proof of debt, and is not such a creditor of the debtor as to be entitled to a hearing in a Court of Bankruptcy; and

b. That the determination by the conciliation commissioner was not justified by the evidence in the case in that the fair and convincing proof and preponderance thereof was to the effect that the herein petitioner was and is a farmer within the meaning of Section 75 of the Bankruptcy Act as amended.

Wherefore, petitioner feeling aggrieved because of such order, prays that the same may be reviewed as provided for in the Bankruptcy Act and General Order XXVII, and by such other and further orders and rules as are germane to the review of the orders of conciliation commissioners.

Dated at Burns, Oregon, March 20th, 1939.

SAMUEL R. BENNETT
Petitioner

PAT H. DONEGAN
Petitioner's Attorney

[Endorsed]: Filed March 20, 1939, 2:30 P. M. By Richard E. Kriesien, Conciliation Commissioner for Harney County.

[Endorsed] :Filed March 27, 1939. G. H. Marsh, Clerk. [35]

And afterwards, to wit, on the 24th day of March, 1939, there was duly filed in said Court, by the Conciliation Commissioner, and on March 27, 1939, by the Clerk, Answer of C. H. Leonard to petition to review order of Conciliation Commissioner, in words and figures as follows, to wit: [36]

[Title of District Court and Cause.]

IN ANSWER TO PETITION OF REVIEW FILED BY SAMUEL R. BENNETT

To the Hon. R. E. Kriesien, Conciliation Commissioner for Harney County and

To the Hon. Claude McColloch, Judge of the above entitled Court, Portland, Oregon:

Comes now C. H. Leonard, named in said petition for review, and alleges:

That the said Samuel R. Bennett in subdivision a. of Par. 2 states that "The aforesaid C. H. Leonard was without authority to file said petition, and the said conciliation commissioner was without jurisdiction to hear and determine the same, in that the said C. H. Leonard has failed to file with said conciliation commissioner any proof of debt, and is not such a creditor of the debtor as to be entitled to a hearing in a Court of Bankruptcy:"

That the fact in this regard is that at said hearing the said C. H. Leonard inquired of the said conciliation commissioner, if at this time, on his part, any other or further or formal claim or proof of his debt would be necessary or required, for the purposes of the record, other than was clearly

shown by the affidavit of the said C. H. Leonard, as well as other records in the case and the testimony of witnesses including the said C. H. Leonard; whereupon the said conciliation commissioner advised that any further or formal filing of the same was not necessary or required at this time; that the only question then to be determined was whether or not the petitioner was qualified to file a petition under or invoke the protection of the provisions of Sec. 75 of the Bankruptcy Act.

Likewise the petitioner Samuel R. Bennett on subdivision b. of Par. 2, alleges that "The determination by the conciliation commissioner was not justified by the evidence in the case in that the fair and convincing proof and preponderance thereof was to the effect that the herein petitioner was and is a farmer within the meaning of Section 75 of the Bankruptcy Act as amended."

On this point the said C. H. Leonard alleges and contends that the evidence produced on the hearing fully and completely sustained the allegations contained in his affidavit attached to and forming a part of his motion to dismiss this case; that the said petitioner failed completely to come under or within the provisions contained in subdivision (r). of said Act defining a "farmer", and the numerous and overwhelming authorities and decisions on this point; and the evidence further showing that the said C. H. Leonard in the fall of 1930, at petitioner's request, advanced the funds for a period of one year to pay the delinquent assessments, installments,

and taxes demanded by the Federal Land Bank, to keep the said Bank from instituting foreclosure [37] proceedings, and to provide the petitioner one year in which to refinance himself, which was never done, as shown by the records herein.

Wherefore, the said C. H. Leonard prays that the order of the conciliation commissioner herein be approved and sustained in all things: On the following grounds:

That the petition for review herein was not filed within the time nor in the manner provided by law:

That the petitioner Samuel R. Bennett submitted to the jurisdiction of the conciliation commissioner without protest or objection in any way, and that the question of such jurisdiction cannot be properly raised or considered herein at this time;

And lastly, that the evidence in this case and cause conclusively shows that the petitioner is not a "farmer" as defined and within the meaning and interpretations of the authorities, and as provided for and required under the Act,

And that the said conciliation commissioner could not do otherwise than make the findings and order in this case as set out in the records.

Dated at Burns, Oregon, March 21st, 1939.

C. H. LEONARD
Answering Petitioner

ROB'T M. DUNCAN
C. H. LEONARD
Attorneys for C. H. Leonard [38]

State of Oregon,
County of Harney—ss.

I, C. H. Leonard being first duly sworn, say that I am the Answering Petitioner in the within entitled case, that I have read the foregoing Answering Petition and know the contents thereof, and the same is true, as I verily believe.

C. H. LEONARD

Subscribed and sworn to before me this 21st day of March, 1939.

[Seal] J. S. COOK
Notary Public for the State of Oregon

My Commission expires July 1st, 1940.

State of Oregon,
County of Harney—ss.

Due service of the within Answering Petition by a receipt of a copy thereof is hereby admitted in Harney County, Oregon, this 21st day of March, 1939.

PAT H. DONEGAN
Attorney for Samuel R. Bennett

[Endorsed]: Filed March 24th, 1939 at 10:30 A. M. Richard E. Kriesien, Conciliation Commissioner for Harney County.

[Endorsed]: Filed March 27, 1939. G. H. Marsh, Clerk. [39]

And afterwards, to wit, on the 10th day of April, 1939, there was duly filed in said Court, a Certificate of the Conciliation Commissioner of question for review by the Judge, in words and figures as follows, to wit: [40]

[Title of District Court and Cause.]

CERTIFICATE

I, Richard E. Kriesien, Conciliation Commissioner for Harney County, Oregon, do hereby certify that in the above entitled proceedings and on the 28th day of February, 1939, I made and entered therein the following findings and order, to-wit:

> "C. H. Leonard, creditor herein, filed his petition alleging that the debtor, Samuel R. Bennett, is not a farmer, nor in any manner qualified to file a petition under or invoke the protection of the provisions of Section 75 of the Bankruptcy Act.
>
> "Upon the above petition C. H. Leonard, a creditor, testified that the debtor is a full time employe, namely: District Grazier, District #4, Jordan Valley, Oregon, of the Division of Grazing, Department of the Interior of the United States and that said debtor is not personally engaged in farming nor does said debtor derive his principal income from farming activities. The debtor, Samuel R. Bennett, testified that during the past eighteen months he has been a full time employe of the United States Government in the capacity of District

Grazier, District #4, of the Division of Grazing, Department of the Interior, on a yearly wage of $1,860.00, and that said wage has been his principal source of income, and that he has not been personally engaged in farming during said period. Debtor further testified that if he was successful in effectuating a composition or extension of his debts that he would retain his employment as District Grazier and hire employes to farm his land or if he could borrow sufficient money that he would return to and operate his farm personally, but that he could not indicate with any degree of certainty when he would be in a position to farm his property personally.

"In view of the fact that there was no dispute as to the question of the debtor's employment by the United States government and as debtor testified that his principal source of income was his employment in the Division of Grazing, Department of the Interior of the United States and that he was not personally engaged in farming, the Conciliation Commissioner finds that the debtor is not a farmer as defined and classified by Section 75 of the Bankruptcy Act and now therefore, it is

"Ordered, adjudged and decreed, that the petition of C. H. Leonard, a creditor herein, praying for the dismissal of the petition of Samuel R. Bennett, debtor, for a composition or extension under Section 75 of the Bank-

ruptcy Act be and is hereby sustained, and the petition of Samuel R. Bennett be and is hereby dismissed on the ground and for the reason that said debtor is not a farmer within the meaning of Section 75 of the Bankruptcy Act; and the [41] said question is certified to the Honorable Claude McColloch, Julge of said Court, for his opinion thereon."

That thereafter, and on the 1st day of March, 1939, due notice of the said order above described was by me served upon the bankrupt, Samuel R. Bennett, as well as upon the creditors, C. H. Leonard, A. A. Bardwell, Burns Times Herald and the Federal Land Bank of Spokane.

That thereafter, and on March 10th, 1939, a similar notice was served upon the bankrupt and upon the creditors above named, again advising that the said order was final, subject only to review under the provisions of Section 39C of the Amended Bankruptcy Act.

That thereafter, and on March 20th, 1939, the bankrupt feeling aggrieved did file with me a petition to review the said findings and order above described.

That heretofore, and on March 24th, 1939, the entire proceedings above described were by me filed in the District Court of the United States for the District of Oregon.

That the said petition for review raises the identical questions set forth in the findings and order hereinbefore quoted, and the same are hereby certified to the Court for its findings and decision.

Dated at Burns, Oregon, this 7th day of April, 1939.

RICHARD E. KRIESIEN
Conciliation Commissioner
for Harney County, Oregon

[Endorsed]: Filed 1:30 P. M. April 10, 1939.

[42]

And afterwards, to wit, on the 15th day of April, 1939, there was duly filed in said Court, an Order of Honorable Claude McColloch, District Judge, referring case back to Conciliation Commissioner, in words and figures as follows, to wit: [43]

[Title of District Court and Cause.]

ORDER

This cause was heard by the court on review of the order of the Conciliation Commissioner dismissing the proceedings and upon the motion of the Federal Land Bank of Spokane and the motion of C. H. Leonard, creditors, to dismiss this proceeding based upon the report filed by the Conciliation Commissioner herein. The above named debtor appearing by Mr. S. J. Bischoff, of counsel, and the said creditor, Federal Land Bank, by Mr. John M. Colon of counsel, and the said creditor, C. H. Leonard, by Robert M. Duncan of counsel. On consideration whereof the court now reserves its decision upon the question of whether the above named debtor is a farmer as defined by Section 75 of the Act of Congress relating to Bankruptcy and

It is ordered that this cause be referred back to Richard E. Kriesien, Conciliation Commissioner for further proceedings in this cause and after a hearing upon notice to all of the parties interested in this proceeding, to determine whether or not the proposal of the debtor to his creditors already made or as the same may be modified includes an equitable and feasible method of liquidation for the secured creditors, and for financial rehabilitation for the debtor.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed April 15, 1939. [44]

And afterwards, to wit, on the 15th day of May, 1939, there was duly filed in said Court, by the Conciliation Commissioner, and on September 16, 1939, by the Clerk, Debtor's Amended Proposal for composition and extention, in words and figures as follows, to wit: [45]

[Title of District Court and Cause.]

DEBTOR'S AMENDED PROPOSAL FOR COMPOSITION AND EXTENSION

Before Honorable Richard E. Kriesien, Conciliation Commissioner:

To the Creditors of the above named debtor:

I, Samuel R. Bennett, the debtor above named, do hereby submit to my creditors my amended pro-

posal for composition and extension upon the following terms and conditions, to-wit:

(a) I will pay all expenses of administration in cash as the same may be determined and fixed by the Court;

(b) I will pay all taxes on the real and personal property as the same become due and payable;

(c) I will continue the payment of all installments of principal and interest on the mortgages now held by the Federal Land Bank of Spokane until the full amount of said mortgages are paid as said installments become due and payable;

(d) I will pay $4000.00 in full settlement of all notes, mortgages and judgments held by C. H. Leonard and/or Fred Haines, or the estate of Fred Haines, deceased, whether held individually or jointly, said sum to be paid in equal annual installments of $1,000.00 each, with interest on the deferred amounts at the rate of 6% per annum, interest to be paid at the time of the payment of the installment of principal, the first payment to be made within one year after confirmation of this composition and annually thereafter until the full sum is paid;

(e) I will pay to my general creditors twenty five per cent of the amount of the claims filed and allowed by the Court, said payment to be made in twelve equal monthly install-

ments, the first payment to be made thirty days after confirmation of this composition;

(f) The Court shall retain jurisdiction of these proceedings and property of the estate of the above named debtor until all of the terms and conditions of this composition have been complied with; that all payments to be made hereunder shall be made into Court for distribution to the respective parties or to such trustee agency or depositary as the Court may designate.

Dated at Burns, Oregon, May 13th, 1939.

Respectfully submitted,

SAMUEL R. BENNETT

Debtor

[Endorsed]: Filed at hearing May 15, 1939, before Conciliation Commissioner for Harney County, Ore. R. E. Kriesien.

[Endorsed]: Filed Sept. 16, 1939. [46]

And afterwards, to wit, on the 11th day of September, 1939, there was duly filed in said Court, Findings by Conciliation Commissioner, in words and figures as follows, to wit: [47]

[Title of District Court and Cause.]

FINDINGS

This cause was re-referred to the Conciliation Commissioner of the above court for Harney County, Oregon, for further proceedings herein to

determine two separate and distinct questions, namely, whether the proposal of the debtor to his creditors already made or as the same may be modified includes

A. An equitable and feasible method of liquidation for the secured creditors, and

B. An equitable and feasible method of financial rehabilitation for the debtor.

After notice to all parties interested in this proceedings, hearing was had before the Conciliation Commissioner on the 15th day of May, 1939. Debtor appearing personally and by attorneys S. J. Bischoff, of Portland, and Pat H. Donegan and C. B. Phillips, of Burns, and creditor C. H. Leonard appearing personally and by Attorney Robert M. Duncan, of Burns. Both debtor and creditor requesting that the testimony be recorded a stenographer of the City of Burns, with the consent of both parties, acted as Court Reporter.

Debtor at the time of hearing filed his amended proposal for a composition and extention in the following words and figures, to-wit:

[Title of District Court and Cause.]

DEBTOR'S AMENDED PROPOSAL FOR COMPOSITION AND EXTENSION

Before Honorable Richard E. Kriesien, Conciliation Commissioner:

To the Creditors of the above named debtor:

I, Samuel R. Bennett, the debtor above named, do hereby submit to my creditors my

amended proposal for composition and extension upon the following terms and conditions, to-wit:

(a) I will pay all expenses of administration in cash as the same may be determined and fixed by the Court; [48]

(b) I will pay all taxes on the real and personal property as the same become due and payable;

(c) I will continue the payment of all installments of principal and interest on the mortgages now held by the Federal Land Bank of Spokane until the full amount of said mortgages are paid as said installments become due and payable;

(d) I will pay $4000.00 in full settlement of all notes, mortgages and judgments held by C. H. Leonard and/or Fred Haines, or the estate of Fred Haines, deceased, whether held individually or jointly, said sum to be paid in equal annual installments of $1,000.00 each, with interest on the deferred amounts at the rate of 6% per annum, interest to be paid at the time of the payment of the installment of principal, the first payment to be made within one year after confirmation of this composition and annually thereafter until the full sum is paid;

(e) I will pay to my general creditors twenty five per cent of the amount of the claims filed and allowed by the Court, said pay-

ment to be made in twelve equal monthly installments, the first payment to be made thirty days after confirmation of this composition;

(f) The Court shall retain jurisdiction of these proceedings and property of the estate of the above named debtor until all of the terms and conditions of this composition have been complied with; that all payments to be made hereunder shall be made into Court for distribution to the respective parties or to such trustee, agency or depositary as the Court may designate.

Dated at Burns, Oregon, May 13th, 1939.

Respectfully submitted,

SAMUEL R. BENNETT

Debtor

After the hearing, both parties requested time within which to file briefs herein which request was allowed by the Conciliation Commissioner.

Before the Conciliation Commissioner enters his findings upon the questions re-referred, he wishes to state that his findings will be limited exclusively to the matters re-submitted and that his findings will be based entirely upon the application of the amended proposal to the facts now before the Conciliation Commissioner.

After due consideration of the amended proposal, the evidence and the exhibits on file herein the Conciliation Commissioner finds: [49]

A. That debtor's amended proposal for a composition and extension does not include an

equitable and feasible method of liquidation for the secured creditor, C. H. Leonard, for the reason that the same proposes that the secured creditor, C. H. Leonard, accept the sum of $4000.00 with interest thereon at the rate of 6% per annum as a full and complete satisfaction and discharge of the judgment possessed by the creditor, C. H. Leonard in excess of $10,000.00. The debtor in his brief sets forth that the contested claim of C. H. Leonard is approximately $5000.00 to $6000.00 but proposes to pay the secured creditor, C. H. Leonard, the sum of $4000.00. There having been no acceptance of the debtor's proposal by a majority in amount and number of the secured creditors the Conciliation Commissioner finds that Sub-section "K" of Section 75 of the Bankruptcy Act wherein the fair and reasonable market value of the property is taken into consideration in reducing the amount of the lien of any secured creditor has no application herein.

B. The Conciliation Commissioner finds that the amended proposal for a composition and extension provides an equitable and feasible method of liquidation for the secured creditor, Federal Land Bank of Spokane, for the reason that the amended proposal contemplates a discharge in full of secured creditor's mortgage.

C. The Conciliation Commissioner finds that if the secured creditor, C. H. Leonard, was

compelled to accept the sum of $4000.00, as proposed by the debtor, that there is a probability of financial rehabilitation for the debtor but that the amended proposal contains the maximum revenue of which debtor's property is capable of producing.

Done and dated at Burns, Oregon this 8th day of September, 1939.

RICHARD E. CRIESIEN
Conciliation Commissioner for
Harney County, Oregon

[Endorsed]: Filed September 11, 1939. [50]

And afterwards, to wit, on the 13th day of September, 1939, there was duly filed in said Court, Debtor's Exceptions to the findings of the Conciliation Commissioner, in words and figures as follows, to wit: [51]

[Title of District Court and Cause.]

EXCEPTIONS

Comes now the debtor above named and excepts to the Findings of the Conciliation Commissioner filed September 11, 1939, in which he finds that the

"debtor's amended proposal for a composition and extension does not include an equitable and feasible method of liquidation for the secured creditor, C. H. Leonard, for the reason that the same proposes that the secured creditor,

C. H. Leonard, accept the sum of $4000.00 with interest thereon at the rate of 6% per annum as a full and complete satisfaction and discharge of the judgment possessed by the creditor, C. H. Leonard, in excess of $10,000.00. The debtor in his brief sets forth that the contested claim of C. H. Leonard is approximately $5000.00 to $6000.00 but proposes to pay the secured creditor, C. H. Leonard, the sum of $4,000.00. There having been no acceptance of the debtor's proposal by a majority in amount and number of the secured creditors the Conciliation Commissioner finds that Sub-section "K" of Section 75 of the Bankruptcy Act wherein the fair and reasonable market value of the property is taken into consideration in reducing the amount of the lien of any secured creditor has no application herein."

and in which he finds that

"The Conciliation Commissioner finds that if the secured creditor, C. H. Leonard, was compelled to accept the sum of $4000.00, as proposed by the debtor, that there is a probability of financial rehabilitation for the debtor but that the amended proposal contains the maximum revenue of which debtor's property is capable of producing."

Dated this 12th day of September, 1939.

S. J. BISCHOFF,
PAT DONEGAN,
Attorneys for Debtor. [52]

Please take notice that the foregoing exceptions to the Fndings of the Conciliation Commissioner will be brought on for hearing before Honorable Claude C. McColloch, Judge of the above entitled Court, on Thursday, September 21, 1939, at 10:00 A. M. at the Federal Court House in the City of Portland, State of Oregon.

Dated this 12th day of September, 1939.

C. J. BISCHOFF,
PAT DONEGAN,
Attorneys for Debtor.

I hereby certify that I served a true copy of the foregoing Exceptions to the Findings of the Conciliation Commissioner upon Robert M. Duncan, attorney for the objecting creditor by mailing the same to him at Burns, Oregon, on the 12th day of September, 1939.

S. J. BISCHOFF,
Of Attorneys for Debtor.

[Endorsed]: Filed September 13, 1939. [53]

And afterwards, to wit, on the 30th day of September, 1939, there was duly filed in said Court, an Order of Honorable Claude McColloch, District Judge, in words and figures as follows, to wit: [54]

[Title of District Court and Cause.]

ORDER

Efforts to effect a composition having failed, and debtor, through his attorney, having applied in open court for leave to file an amended petition under Sub-section (s) of the Farmer-Debtor Act, such leave is hereby granted upon condition that amended petition be filed within thirty (30) days from date hereof.

Dated September 30, 1939.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed September 30, 1939. [55]

And afterwards, to wit, on the 19th day of October, 1939, there was duly filed in said Court, an Order of the Honorable Claude McColloch, District Judge, sustaining exceptions to findings of Conciliation Commissioner, and permitting debtor to file under sub-section "S" in words and figures as follows, to wit: [56]

In the District Court of the United States
for the District of Oregon

No. B-23787

In the Matter of
SAMUEL R. BENNETT,
Debtor.

ORDER

This cause coming on for hearing on the motions of C. H. Leonard and the Federal Land Bank of Spokane to dismiss the petition filed by the debtor under Subdivisions (a) to (r) of the Farmer-Debtor Act on the grounds (1) that the debtor is not a farmer, and (2) that the petition was not filed in good faith; the cause having been referred to Richard E. Kriesien, Conciliation Commissioner, upon said issues, and the Conciliation Commissioner having filed herein reports, exceptions to said reports having been filed and the said exceptions having been argued to the Court, and the Court being now fully advised in the premises, it is

Ordered that the exceptions of the debtor to the reports of the Conciliation Commissioner be and the same hereby are sustained; and it is further

Ordered that the said motions of the objecting creditors, C. H. Leonard and Federal Land Bank of Spokane, be and the same hereby are denied, without prejudice to the right of the creditors to raise the question of probability of rehabilitation in the event that the debtor should file an amended petition under Subdivision (s) of the Farmer-Debtor Act, in which event the record heretofore made upon that question may be used by either party upon the submission of that question for determination, and the parties may, in that event, submit such additional evidence upon that question that they may desire. [57]

And it appearing further from the report of the Conciliation Commissioner filed herein that efforts to effect a composition under Subdivisions (a) to (r) of said Act have failed by reason of the failure of the debtor to obtain the consents of the creditors as required by law, and the debtor having applied to the Court for leave to file an amended petition under Subdivision (s) of said Act, it is further

Ordered that the debtor is hereby granted leave to file an amended petition under Subdivision (s) of said Act, provided said amended petition is filed within thirty (30) days from the date hereof; and it is further

Ordered that the order heretofore made and entered on September 30, 1939, be and the same hereby is vacated.

Dated this 19th day of October, 1939.

CLAUDE McCOLLOCH,

Judge.

[Endorsed]: Filed October 19, 1939. [58]

And afterwards, to wit, on the 14th day of November, 1939, there was duly filed in said Court, an Amended Petition and schedules, in words and figures as follows, to wit: [59]

AMENDED DEBTOR'S PETITION
B-23787

In Proceedings Under Section 75 Sub-Section S of the Bankruptcy Act

To the Honorable James Alger Fee and Claude McColloch, Judges of the District Court of the United States for the District of Oregon.

Bankruptcy Division

The petition of Samuel R. Bennett of Burns, in the County of Harney, and District and State of Oregon, Occupation, Trade, or Business of Farmer.

Respectfully represents: That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows:

That such farming operations occur in the county (or counties) of Harney within said judicial district; and that he is insolvent (or unable to pay his debts as they mature); that he has filed a petition (official form no. 65) under Section 75 of the acts of Congress relating to bankruptcy;

That he has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims were affected by a composition or extension proposal; and that he desires to obtain the benefit of Section 75 sub-section S of the Acts of Congress relating to Bankruptcy.

That ..... is aggrieved by the composition or extension; and that ..... desires to obtain the

benefit of Section 75 Sub-Section S of the acts of Congress relating to Bankruptcy.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts and (so far it is possible to ascertain) the names and places of residence of his creditor, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the Court to be a bankrupt in accordance with acts relating to Bankruptcy and all acts amendatory thereof.

SAMUEL R. BENNETT,
Petitioner.
S. J. BISCHOFF,
Public Service Building,
Portland, Oregon,
Attorney. [60]

United States of America,
District of Oregon—ss.

I, Samuel R. Bennett, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements

contained therein are true according to the best of my knowledge, information and belief.

SAMUEL R. BENNETT,
Petitioner.

Subscribed and sworn to before me, this 10th day of November, A. D. 1939.

[Seal] ARCHIE WEINSTEIN,
Notary Public for Oregon.

My commission expires April 17, 1943. [61]

[Title of District Court and Cause.]

STATEMENT OF AFFAIRS

Form No. 2

(For Bankrupt or Debtor not engaged in Business)

1. Name and Residence.

a. What is your full name? Samuel R. Bennett.

b. Where do you now reside? Residence at Burns, Oregon, Temporarily located at Jordan Valley, Oregon.

c. Where else have you resided during the six years immediately preceding the filing of the original petition herein? None.

2. Occupation and Income.

a. What is your occupation? Farmer or employed by Grazing Division of U. S. Dept. of Interior.

b. Where are you now employed? Grazing Division U. S. Department of Interior.

c. Have you been in partnership with anyone, or engaged in any business, during the six years immediately preceding the filing of the original petition herein? No.

d. What amount of income have you received from your trade or profession during each of the two years immediately preceding the filing of the original petition herein? Revenue derived from farming operations approximately $3000 a year during each of two years preceeding filing of original petition. The exact amount is unknown because the revenue was collected by C. H. Leonard, the mortgagee.

e. What amount of income have you received from other sources during each of these two years? $1860.00 per year.

3. Income Tax Returns.

a. Where did you file your last federal and state income tax returns and for what years? Federal income tax return filed with Collector for Oregon and state return with the Oregon State Tax Commission.

4. Bank Accounts and Safe Deposit Boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name within two years immediately preceding the filing of the original petition herein? Harney County National Bank.

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the

two years immediately preceding the filing of the original petition herein? None.

5. Books and Records.

a. Have you kept books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein? None except such records as were maintained by C. H. Leonard for the operation of the farm properties.

b. In whose possession are these books or records? C. H. Leonard.

c. Have you destroyed any books of account or records relating to your affairs within the two years immediately preceding the filing of the original petition herein? None. [62]

6. Property Held in Trust.

a. What property do you hold in trust for any other person? None.

7. Prior Bankruptcy or other proceedings: Assignments for benefit of creditors.

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein? None.

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee? C. H. Leonard claims to be in possession of the farm properties described in the schedules attached hereto and claims such possession by virtue of mortgages.

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition herein? None.

8. Suits, Executions and Attachments.

a. Have you been party plaintiff or defendant in any suit within the year immediately preceding the filing of the original petition herein? None except foreclosure proceeding commenced by C. H. Leonard to foreclose mortgages described in the schedules.

b. Has any execution or attachment been levied against your property within the four months immediately preceding the filing of the original petition herein? No.

9. Loans Repaid.

a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein? None.

10. Transfer of Property.

a. What property have you transferred or otherwise disposed of during the year immediately preceding the filing of the original petition herein? None.

11. Losses.

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the original petition herein? None.

SAMUEL R. BENNETT,
Bankrupt (or Debtor)

State of Oregon,
County of Harney—ss.

I, Samuel R. Bennett, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

[Seal] SAMUEL R. BENNETT,
Bankrupt (or Debtor)

Subscribed and sworn to before me this 10th day of November, 1939.

ARCHIE WEINSTEIN,
Notary Public for Oregon.

My commission expires April 17, 1943. [63]

SCHEDULE A-1

STATEMENT OF ALL DEBTS OF BANKRUPT

Statement of All Creditors to Wh om Priority is Secured by the Act

Claims which have priority	Reference to Ledger or Voucher	Names of Creditors	Residences	When & Where incurred or contracted	Whether Claim is Contingent Unliquidated or Disputed	Nature and Consideration of Debt	AMOUNT Due or Claimed
A. Wages due workmen, servants, clerks or traveling or city salesmen on salary or commission basis whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600. each, earned within three months before filing the petition.		None					
b. Taxes due and owing to—							
(1) the United States		None					
(2) The State of Oregon		None					
(3) The county, district or municipality of Harney State of Oregon							233.39
c. (1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority.		None					
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of ..... accrued within three months before filing the petition, for actual use and occupancy.		None					
						Total	233.39

SAMUEL R. BENNETT
Petitioner [64]

SCHEDULE A-2

CREDITORS HOLDING SECURITIES

Reference to Ledger or Voucher	Names of Creditors	Residences	Description of Securities—When & Where Debts were contracted—Whether Claim is Contingent, Unliquidated or Disputed	Value of Securities	Amount Due or Claimed
	Federal Land Bank of Spokane,	Spokane, Washington,	mortgage on real property, to-wit: East half of the Southwest quarter and Lots three and four of Section thirty, township twenty-three South of Range thirty-one East of Willamette Meridian, Harney County, Oregon, together with all water rights, privileges and franchises appertaining thereto, and especially a right of way for an irrigation ditch, and sufficient for a dam in Silvies River upon the northwest quarter of the northeast quarter of said Section thirty, and the right to go upon the premises at any time to repair said ditch and dam, dated September 1, 1922. Mortgage to Federal Land Bank of Spokane, Spokane, Washington, on Lots four and five of Section Seventeen and the East half of the northeast quarter of Section eighteen, township twenty-three South Range thirty-one east of Willamette Meridian; also Southeast quarter of Section thirty-one in township nineteen, South Range thirty-one East of the Willamette Meridian, and Lots three, four and five in the southeast quarter of the northwest quarter of Section six in township twenty south Range thirty-one east of Willamette Meridian; also All of Block 51 in the Second Addition to the town (now City) of Burns, all in Harney County, Oregon, dated November 28, 1922, which two mortgages were given to secure an indebtedness of $10,000 upon which there is now owing approximately 5800. Normal Value in excess of $20,000. Present Value	10,000.00	5,800.00
	C. H. Leonard,	Burns, Oregon,	Mortgage given to secure note for $3000 on real property, to-wit: All of Lots Four and Five, Section Seventeen, and the East half of the Northeast quarter of Section Eighteen in Township twenty-three south Range Thirty-one East of Willamette Meridian; also The Southeast quarter of Section Thirty-one in Township nineteen South Range Thirty-one East of the Willamette Meridian, and Lots three, four, and five and the southeast quarter of the northwest quarter of Section six, in Township twenty, south range Thirty-one East of the Willamette Meridian: also [65] All of Block Fifty-one in the Second Addition to the City of Burns, Oregon; also The East half of the Southwest quarter and Lots Three and Four in Section Thirty, Township Twenty-three South Range Thirty-one East of the Willamette Meridian; also The East half of the southwest Quarter of Section Eight, in Township Twenty-three South Range Thirty-one East of Willamette Meridian (save and excepting therefrom Tracts Two, Three, Four and		

SCHEDULE A-2 (Continued)

CREDITORS HOLDING SECURITIES

Refeecence to Ledger or Voucher	Names of Creditors	Residences	Description of Securities—When & Where Debts were contracted—Whether Claim is Contingent, Unliquidated or Disputed	Value of Securities	Amount Due or Claimed
			Five consisting of five acres each contained in said above described lands), All of said lands being in Harney County, Oregon. These notes and the mortgage referred to herein were given to C. H. Leonard and Fred Haines February 18, 1931. Haines interest has been assigned to C. H. Leonard. The mortgage is subject to the aforesaid mortgage held by the Federal Land Bank of Spokane.		
	C. H. Leonard,	Burns, Oregon,	mortgage on Lots Four and Five of Section Seventeen, and the East half of the Northeast quarter of Section Eighteen in Township Twenty-three South Range Thirty-one East of Willamette Meridian; also The Southeast quarter of Section Thirty-one in Township Nineteen South Range Thirty-one East of Willamette Meridian and Lots Three, Four and Five and the Southeast quarter of the Northwest quarter of Section Six in Township Twenty, South Range Thirty-one East of Willamette Meridian; also All of Block Fifty-one in the Second Addition to the City of Burns, Oregon; also The East half of the Southwest quarter and Lots Three and Four in Section Thirty in Township Twenty-three South Range Thirty-one East of Willamette Meridian, all located in Harney County, Oregon. This mortgage was given to secure notes aggregating $3000 given to C. H. Leonard and Fred Haines, Fred Haines interest assigned to C. H. Leonard. Mortgage is dated November 6, 1930, and is subject to the aforesaid mortgages held by the Federal Land Bank of Spokane. [66]		
	C. H. Leonard,	Burns, Oregon,	Mortgage on East half of southwest quarter of Section eight in Township Twenty-three South of Range Thirty-one East of Willamette Meridian, Harney County, Oregon given to Homar B. Mace and assigned to C. H. Leonard. Mortgage dated April 28, 1925 and was given to secure a note for $3000. Creditor claims an indebtedness on said notes and mortgages totalling in excess of $10,000 which petitioner disputes and alleges that the indebtedness does not exceed the sum of $5000. The normal value of the property described in the said three mortgages is approximately $25,000. Present value	10,000.	5,000.00
	Home Owners Loan Corporation	San Francisco. California,	mortgage on Lots Two and Eleven, Block Eleven, Bennett's Second Addition to the City of Burns, Harney County, Oregon	2,000.00	600.00
			Total	22,000.00	11,400.00

SAMUEL R. BENNETT
Petitioner [67]

OATH TO SCHEDULE A

State of Oregon,
County of Harney—ss.

I, Samuel R. Bennett, the person who subscribed to the foregoing Schedule do hereby make solemn oath that the said Schedule is a statement of all my debts, in accordance with the Act of Congress relating to Bankruptcy, according to the best of my knowledge, information, and belief.

SAMUEL R. BENNETT,
Petitioner.

Subscribed and sworn to before me this 10th day of November, A. D. 1939.

[Seal] ARCHIE WEINSTEIN,
Notary Public for Oregon.

My commission expires April 17, 1943. [68]

SCHEDULE B-1

STATEMENT OF ALL PROPERTY OF BANKRUPT

Real Estate

Location and description of all real estate owned by debtor, or held by him, whether under deed, lease or contract—Incumbrances thereon if any, and dates thereof—Statement of particulars relating thereto	Estimated Value of Debtor's Interest
Real property described in Schedule A-2, the normal value approximately $25000, present value approximately $10,000	00.00
Lots 2 and 11, Block 11, Bennett's Second Addition to the City of Burns, Harney County, Oregon. Present balance of Mortgage $600.00. Residence property	1400.00
An undivided interest in and to the East half of the Southwest quarter and the Southeast quarter of Section 22, and the southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section 23, Township 39, South Range 35, East of the Willamette Meridian, Harney County, Oregon, subject to mortgage given to secure $100	500.00
(Title to this property was in Trout Creek Farms, a corporation, in which petitioner had stock. Petitioner believes the corporation has been dissolved, and the stockholders have become tenants in common thereof. Exact status now unknown to petitioner.)	
Total	1900.00

SAMUEL R. BENNETT

Petitioner [69]

SCHEDULE B-2

PERSONAL PROPERTY

a. Cash on Hand	None	00.00
b. Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies and the like (each to be set out separately)	None	00.00
c. Stock in trade, in business of ... at ... of the value of ...	None	00.00
d. Household goods and furniture household stores, wearing apparel and ornaments of the person ...	None	00.00
e. Books, prints and pictures ...	None	00.00
F. Horses, cows, sheep, and other animals (with number of each)	seven mules and five horses	360.00
g. Automobiles and other vehicles	None	00.00
h. Farming stock and implements of husbandry	None	00.00
I. Shipping, and shares in vessels	None	00.00
i. Machinery, fixtures, apparatus, and tools used in business with the place where each is situated	None	00.00

k. Patents, copyrights, and trademarks . . .	None	00.00
l. Goods or personal property of any other description, with the place where each is situated	None	00.00
	Total	360.00

SAMUEL R. BENNETT
Petitioner [70]

SCHEDULE B-3
CHOSES IN ACTION

a. Debts due petitioner on open account.	None	00.00
b. Policies of insurance (Surrender value only.)	Oregon Life Insurance Company, Policy No. 42143	500.00
	Oregon Life Insurance Company, Policy No. 77880, issued same Company —No. 77881	00.00
c. Unliquidated claims of every nature with their estimated value.	None	00.00
d. Deposits of money in banking institutions and elsewhere	None	00.00
	Total	500.00

SAMUEL R. BENNETT
Petitioner [71]

SCHEDULE B-4

PROPERTY IN REVERSION, REMAINDER, OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

General Interest	Particular Description	Estimated Value of Interest
Interest in Land	None	00.00
Personal Property	None	00.00
Property in money, stock, shares, bonds, annuities, etc.	None	00.00
Rights and Powers, legacies and bequests.	None	00.00
Property heretofore conveyed for benefit of creditors		
Portion of Debtor's Property conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom and disposal of same, so far as known to debtor.	None	00.00
Attorney's Fees Sum or sums paid to Counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	S. J. Bischoff, Public Service Bldg., Portland, Oregon, and Pat H. Donegan, Burns, Oregon	150.00
	Total	150.00

SAMUEL R. BENNETT
Petitioner [72]

SCHEDULE B-5

PROPERTY CLAIMED AS EXEMPT FROM THE OPERATION OF THE ACT OF CONGRESS RELATING TO BANKRUPTCY

		Valuation
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.	None	00.00
Property claimed to be exempt by State laws, with reference to the statute creating the exemption.	Lots 2 and 11, Block 11, Bennett's Second Addition to the City of Burns, Harney County, Oregon, Claimed as exempt under Section 3-201 Oregon Code, said property being petitioner's homestead. That the value of said property is less than $3000; is the actual abode of and occupied by petitioner and his family except during temporary absence and does not exceed one block in area or quantity. Equity	1400.00
	Oregon Life Insurance Company, Policy No. 42143	500.00
	Oregon Life Insurance Company, Policy No. 77880 issued 1937, claimed as exempt under Section 46-514 Oregon code	no value
	Same Company No. 77881—claimed as exempt	no value
	Total	1900.00

SAMUEL R. BENNETT
Petitioner [73]

SCHEDULE B-6

BOOKS, PAPERS, DEEDS AND WRITINGS RELATING TO DEBTOR'S BUSINESS AND ESTATE

Books	None
Deeds	Deeds to properties described in the schedules.
Papers	None

SAMUEL R. BENNETT
Petitioner [74]

OATH TO SCHEDULE B.

[Title of District Court and Cause.]

State of Oregon,
County of Harney—ss.

I, Samuel R. Bennett, the person who subscribed to the foregoing Schedule do hereby make solemn oath that the said Schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to Bankruptcy, according to the best of my knowledge, information, and belief.

SAMUEL R. BENNETT,
Petitioner.

Subscribed and sworn to before me this 10th day of November, A. D. 1939.

[Seal] ARCHIE WEINSTEIN,
Notary Public for Oregon

My commission expires April 17, 1943.

[Endorsed]: Filed November 14, 1939, 10:40 A.M.
[75]

And afterwards, to wit, on the 14th day of November, 1939, there was duly filed in said Court, an Adjudication of Bankruptcy, in words and figures as follows, to wit: [76]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Portland, in said district, on the 14th day of November, 1939.

The amended petition of Samuel R. Bennett, filed on the 14th day of November, 1939, that he be adjudged a bankrupt under the act of Congress relating to bankruptcy, having been heard and duly considered;

It is adjudged that the said Samuel R. Bennett is a bankrupt under the act of Congress relating to Bankruptcy.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed November 14, 1939. [77]

And afterwards, to wit, on the 27th day of November, 1939, there was duly filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [78]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Samuel R. Bennett, the debtor above named, and S. J. Bischoff, his attorney of record herein.

You and each of you are hereby notified that C. H. Leonard, a listed secured creditor of the above named debtor, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from that certain order made and entered herein by the Honorable Claude McColloch, one of the judges of the above entitled court, on the 19th day of October, 1939, which said order sustained the debtor's exceptions to the report of the conciliation commissioner herein, denied the motion of the said C. H. Leonard to dismiss the debtor's petition under Subdivisions (a) to (r) of the Farmer-Debtor Act, and granted leave to the debtor to file an amended petition to be adjudged a bankrupt under Subdivision (s) of said Farmer-Debtor Act; and from that certain order of the above entitled court made and entered by the Honorable Claude McColloch on the 14th day of November, 1939, pursuant to the debtor's petition adjudicating the said debtor a bankrupt under Subdivision (s) of the Farmer-Debtor Act.

ROBERT M. DUNCAN
Burns, Oregon.
J. W. McCULLOCH
Public Service Bldg.,
Portland, Oregon.
HUGH L. BIGGS
Pittock Block,
Portland, Oregon.
Attorneys for Appellant.

[Endorsed]: Filed November 27, 1939. [79]

And Afterwards, to wit, on the 27th day of November, 1939, there was duly Filed in said Court, a Bond on Appeal, in words and figures as follows, to wit: [80]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents, that C. H. Leonard, a listed secured creditor of the above named debtor, and Commercial Casualty Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey which has qualified for and is now engaged in the business of writing surety bonds within the State of Oregon, as surety, are held and firmly bound unto Samuel R. Bennett, the above named debtor, in the sum of $250.00 to be paid to the said Samuel R. Bennett, or his successors, for which payment well and truly to be made we bind ourselves jointly and severally, and the successors and assigns of us, firmly by these presents.

The condition of this bond is such that whereas the said C. H. Leonard has appealed to the United States Circuit Court of Appeals for the ninth Circuit from an order made and entered in the above entitled court and cause on the 19th day of October, 1939, and from an order made and entered in the above entitled court and cause on the 14th day of November, 1939;

Now, Therefore, if the said C. H. Leonard shall prosecute his said appeal to effect and shall answer

and pay all damages and costs that may be adjudged against him if he fails to make good his said plea, then this bond shall be void, otherwise to be and remain in full force and effect.

In Witness Whereof, the said C. H. Leonard and the said Commercial Casualty Insurance Company, a corporation, have caused these presents to be executed this 25th day of [81] November, 1939.

[Seal] C. H. LEONARD,
Principal
By HUGH L. BIGGS
of his Attorneys
COMMERCIAL CASUALTY
INSURANCE CO.
By M. L. LITTLE
Its Attorney-in-fact
Surety

United States of America
District of Oregon—ss.

The foregoing and within undertaking is hereby approved in form and amount as a cost bond on appeal herein.

Done and dated in open court this.....day of November, 1939.

.....
District Judge.

[Endorsed]: Filed November 27, 1939. [82]

And Afterwards, to wit, on the 19th day of January, 1940, there was duly Filed in said Court, an Amended Statement of Points on which appellants intend to rely on appeal, in words and figures as follows, to wit: [83]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

I.

That Samuel R. Bennett, Debtor above named, is not and was not at the time of the filing of his petition and schedules for a composition and extension under Subdivisions (a) to (r), Section 75 of the Bankruptcy Act, a farmer within the meaning of said Act.

II.

That the petition of the said Samuel R. Bennett, debtor above named, was and is false and fraudulent in that the said debtor was not, at the time of the filing of said petition, the owner of the real property listed therein.

III.

That the District Court erred in finding that the debtor was a farmer and qualified to invoke the provisions of Subdivision (s) of Section 75 of the Bankruptcy Act.

IV.

That the Court erred in adjudicating the debtor a bankrupt under Subdivision (s), Section 75 of

the Bankruptcy Act, in that the Debtor was not a farmer within the meaning of the Act.

J. W. McCULLOCH
HUGH L. BIGGS
Attorneys for Appellants.

[Endorsed]: Filed Jan 19 1940. [84]

And Afterwards, to wit, on the 19th day of January, 1940, there was duly Filed in said Court, Appellants Amended designation of contents of record on appeal, in words and figures as follows, to wit: [85]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

You will please include in the record of the above entitled cause to be docketed in the Circuit Court of Appeals on appeal herein those portions of the record and proceedings in the above entitled cause herein designated:

1. The debtor's petition and schedules of December 20, 1938, except the following which may be omitted:

(a) Directions in small print at the bottom of the first page which directions begin with the words "All schedules must be filed in triplicate."

(b) Schedule A-1 on second page of petition to be omitted;

(c) Schedule A-4 on fourth page of petition to be omitted;

(d) Schedule A-5 on fifth page of the schedule, but include in your transcript the oath at the bottom of said page;

2. The order approving the debtor's petition dated December 22, 1938;

3. Appellant's motion to dismiss the debtor's petition dated December 31, 1938, including affidavit of C. H. Leonard; [86]

4. The order referring debtor's petition to the Conciliation Commissioner dated January 25, 1939;

5. The order referring appellant's motion to dismiss the proceedings for composition and extension, to the Conciliation Commissioner dated January 25, 1939;

6. The order of the Conciliation Commissioner dismissing the petition and certifying questions to the District Court of the United States of America for the District of Oregon dated the 28th day of February, 1939;

7. The Conciliation Commissioner's notice to creditors dated February 6, 1939;

8. The debtor's proposal for a composition dated February 25, 1939;

9. The debtor's petition for review of the Conciliation Commissioner's order of February 28, 1939, dated March 20, 1939; eliminate all of cover page;

10. The appellant's answer to the debtor's petition for review of the Conciliation Commissioner's said order of February 28, 1939, dated March 21, 1939, and the exhibits made a part thereof, omitting cover page of answer, also omitting cover page of exhibits;

11. The Conciliation Commissioner's certificate dated April 7, 1939, omitting cover page;

12. Order of the Honorable Claude McColloch, Judge of the above entitled court, re referring cause to the Conciliation Commissioner, dated April 15, 1939;

13. Debtor's amended proposal dated May 13, 1939, filed with the Conciliation Commissioner May 15, 1939;

14. Findings of the Conciliation Commissioner dated September 8, 1939;

15. Debtor's exceptions to the Conciliation Commissioner's said findings, dated September 12, 1939;

[87]

16. Order of the Honorable Claude McColloch, Judge of the above entitled court, dated September 30, 1939;

17. Order of the Honorable Claude McColloch, Judge of the above entitled court, granting leave of the debtor to file an amended petition under Subdivision (s) Section 75 of the Bankruptcy Act, dated October 19, 1939;

18. The debtor's amended petition in bankruptcy under Subdivision (s), Section 75 of the Bankruptcy Act, dated November 10, 1939; elimi-

nate pages designated as Schedule A-3, Schedule A-4, Schedule A-5, also filing back;

19. The order adjudicating the debtor a bankrupt under date November 14, 1939;

20. Appellant's notice of appeal dated November 27, 1939;

21. Bond on appeal dated November 27, 1939;

22. Amended narrative statement of testimony;

23. Amended statement of points relied upon by appellant on appeal;

24. Amended designation of contents of record.

J. W. McCULLOCH
HUGH L. BIGGS
Attorneys for Appellant.

[Endorsed]: Filed Jan 19 1940. [88]

And Afterwards, to wit, on the 19th day of January, 1940, there was duly Filed in said Court, an Amended Narrative Statement of the evidence, in words and figures as follows, to wit: [89]

AMENDED NARRATIVE STATEMENT OF THE TESTIMONY MATERIAL TO THE POINTS UPON WHICH THE APPELLANT WILL RELY ON APPEAL.

SAMUEL BENNETT,

Debtor, being first duly sworn, testifies as follows, to-wit:

(Testimony of Samuel Bennett.)

I am the debtor in this proceeding, am 51 years of age, and now live at Burns, Oregon. I was born in Harney County. I am married, my wife's name is Alice Bennett. I have four children, two girls, 23 and 25, and two boys, 15 and 16 years of age. I have been connected with farming and live-stock operations all my life. My father was engaged in the live-stock business in Harney County. He raised livestock and grain. He had about 200 acres of land. In 1901 we moved to Silvies Valley with him. I was then 15 years old. I remained there until I went away to school. I worked on my father's ranch until I was 24 or 25 years of age.

I went into the Forestry Service in 1909, and was in that service 15 years. During the time I was in the Forestry Service, I had a 160 acre ranch up the river and some stock, about twenty head. The principal crop was truck farming, potatoes and alfalfa. During my connection with the Bureau of Forestry, my duties required full time with the service, and I farmed through hired help. My brother worked the ranch. I quit the Forestry Service in 1924.

My wife's father is C. A. Swick. In 1921 he owned two tracts of land near Burns, Oregon, part inside the city limits, one of 145 acres and the other of 80 acres, a total of 225 acres in all. These lands produced wild hay and grain. They are part of the lands described in my schedules. C. A. Swick deeded [90] these lands to me and my wife in 1921. I took

(Testimony of Samuel Bennett.)

over the mortgages and paid up a lot of debts. The Swick land was all in wild hay meadow, except 40 acres. All but 40 acres was plow land, wild hay and grain. That place put up from 250 to 300 tons of wild hay, and 40 acres of good grain land. The grain land has now been sold, and not involved in this case.

I put about $600 into the Swick land at the time of the purchase, and took over mortgages and assumed liabilities. I put in about $2,000 from time to time, which was applied on indebtedness. The land was deeded in 1921. My wife was joined in the deed. She did not put up any money.

After acquiring the Swick lands, I acquired two other tracts, one was the Thornburg tract of 160 acres, and the other was the Mace tract of 80 acres.

I paid for the Thornburg tract by assuming the Federal Land Bank mortgage on the tract, and Thornburg for that consideration gave me a deed to it.

I bought the Mace tract through the First National Bank in 1924; they held the mortgage. That mortgage was paid down to about $2,000 by sale of parts of that land. The Mace land is about the same character as the Thornburg land. All three places would produce about 500 tons of wild hay annually. The average price of hay was around $6.00 per ton. Sometimes a little more, or less, but it always sells well.

(Testimony of Samuel Bennett.)

I quit the Forestry Service in 1924, and devoted all my time to operating these lands. I started in with a dairy; for several years I had about 60 cows and put up hay. I also had about 75 head of cows for breeding, and I sold quite a lot of beef. My income from the dairy cows was from $200 to $300 per month. Little income from other sources; I was buying and selling cattle, and sold hay.

I moved off these lands in the spring of 1930. [91] At the time I moved off, the Federal Land Bank had a mortgage on the Swick lands for $7,000 and a mortgage on the Thornburg lands for $4,000. It was paid down to $3500 *on* $3600, and I had a lot of other debts. In 1924 I platted and sold 40 acres of the Swick tract. I platted a second addition of 40 acres, but sold very little of it. The county took it for taxes.

I also platted the Mace tract into 5 acre tracts and sold several tracts. There is 55 acres left not sold.

When I bought the Swick lands, my father-in-law, Mr. Swick, gave me two deeds, a quitclaim deed and a property deed.

I moved away from the property in 1930 because I became involved so heavily and had so much against the land. There was a mortgage on my cattle. I got a chance to go into a big ranch in the south end of the county, and I left the land to Mr. Leonard to sell the crop and apply all the money on the mortgages as they became due.

(Testimony of Samuel Bennett.)

The only mortgage against the lands other than that of the Federal Land Bank was Mr. Leonard's mortgage.

When I turned the land over to Mr. Leonard, I did not intend to give him the land, but intended to return whenever I got in a place I could; but we struck five dry years and I lost all my cattle, and I then returned here. At that time the mortgage indebtedness against the land was around $18,000.00, that included the amount owed to the Federal Land Bank and to Leonard. In 1935 the mortgages to the Federal Land Bank upon these tracts were about $10,000, and I owed Mr. Leonard about $8,000, making a total of about $18,000. At that time the indebtedness was such it was impossible for me to take it up.

The amount of the decree in the suit that Mr. Leonard filed against me was $18,000, together with the Federal Land Bank. In my opinion the fair value of this property at the present time [92] is about $8,000.

Under normal conditions the value of the Mace acreage of 55 acres if $75.00 per acre, or $4,125. I bought that land in 1925 and paid $75.00 per acre for it. The value of the Thornburg place under normal conditions is $40.00 per acre, or $6,400. The value of the Swick place under normal conditions is $100 per acre, or $14,500. The pasture lands, which are about 25 miles up the river from Burns, have a value of about $1500.

(Testimony of Samuel Bennett.)

Q. Now do you know what these four places would bring on the present market under the conditions that prevail now and have been during the last year or two?

A. You mean for sale right out now?

Q. Yes. If you went out and sold them off. Do you have any idea what could be realized for them?

A. I think it would be hard to realize $10,000.

Q. Have you tried to find a purchaser for the property within the last year or so?

A. I don't know as I have.

Q. Mr. Duncan. Mr. Bennett, you feel that the appraisals that you gave these properties which constitute a total of $26,325 is the present fair value of those properties at this time?

A. Mr. Bennett. I would like to understand your question. I think that is the value of the property. I do not think you could go out today and sell it for that.

Q. In your judgment what constitutes the fair value of the property?

A. The figures I gave you.

Q. Then would you expect to realize that for the property? A. It might take a period of years.

[93]

Q. How many years?

A. Within five years.

Q. But we are in accord upon the statement that you couldn't go out in the next two months and get that much money out of it?

(Testimony of Samuel Bennett.)

A. I do not think you could.

Q. Do you think it could be done in the next two years? A. Possibly.

(Questions by the Conciliation Commissioner)

Q. Your present income since you have been employed by the Division of Grazing has been from your salary? A. Yes.

Q. C.C. At no time have you been deriving any income from the farming of the land within the last eighteen months since you have been employed by the Division of Grazing?

A. I have had a lot of cattle during that period and have done some farming.

Q. C.C. What has your income been from your farming operations since the time you entered the employ of the Government?

A. My personal living expenses and bills have all been paid by my salary.

Q. C.C. Can you estimate how much income you have derived from farming? A. No.

Q. C.C. Have you personally engaged in farming since you have been employed by the United States Government?

A. I have not personally done my farming myself.

Q. C.C. Have you done any farming lately?

A. I am running a place on the lake for my daughter and had a band of cattle last winter.

Q. C.C. How has that been run?

A. Hired help. [94]

Q. C.C. You are the administrator?

(Testimony of Samuel Bennett.)

A. Yes, sir.

In 1934, I incorporated the Bennett Realty Company to handle the second addition, but we never did sell it. The tracts known as the Swick tract, the Mace tract and the Thornburg tract were all deeded to the Bennett Realty Company. The stockholders of that company were my wife, Charles Foley and myself. Charley just had a little. My wife and I held the stock about 50-50. Charley Foley died about two years ago. The annual license fee was never paid and the corporation has been dissolved by proclamation of the Governor. I was informed by Mr. Foley, our attorney, that the property would all be turned back to my wife and myself. Outside of the property up the river, all the money that was furnished in these tracts to the Bennett Realty Company was furnished by me. My wife did not furnish any money of her own.

When I went to Trout Creek in 1930, it was my intention to return here and farm the lands whenever I could get my debts worked out.

At the present time I am employed as District Grazier, and have been so employed since a year ago last May. I receive a salary of $1860 per annum.

If the court made an order under the provisions of Section 75 of the Bankruptcy Act setting apart this land to me, I would not resign my job. I would operate the place with hired help. If I were financially able, I would return to the ranch.

I took possession of the Swick lands in 1921 and

(Testimony of Samuel Bennett.)

farmed and harvested crops each year until 1930. Mr. Leonard has operated the place since 1930 under an agreement to apply the receipts on my indebtedness. He was to operate the lands, pay interest and taxes and expenses of irrigation, etc. My under- [95] standing with Mr. Leonard was that he should operate the land, harvest the crops, and turn the net proceeds in on the indebtedness. I do not know what income was derived from the land. The income was supposed to be applied on the indebtedness to the Federal Land Bank, and to Mr. Leonard. He kept all the records so I do not know just what the income was. I stayed out on the Trout Creek ranch from about 1930 to 1935. Then I moved back here and run cattle for my daughter for about a year. I have lived in the vicinity of Burns ever since. From the time I came back to Burns until I took the grazing position, I was contracting in the summer for hay and running these cattle for my daughter. I wasn't working on the Swick land at that time. Mr. Leonard was operating under the agreement that he had with me, that the income would be applied on the indebtedness.

The Thornburg place lies about three miles east of the Swick land. That was included in the arrangement with Mr. Leonard. There was a mortgage against it also to the Federal Land Bank. Mr. Leonard had been in the possession of these places, running them, since 1930 when I moved to Trout Creek. The dairy cows were turned back on the

(Testimony of Samuel Bennett.)

mortgages, and the beef cows were sold. That was the year before I left Trout Creek, about 1934. I have a couple of milk cows since. During 1924, I was in the real estate business, but I was farming during that time on the Swick land. When I was farming on the Swick land, I had work horses, plows, harrows, mowing machines and milking machines. They were sold in 1934. Since then I have a lot of harnesses, saddles, small tools, etc. At the present time, I own 300 acres of meadow land, two cows, some work horses and saddle horses.

J. W. McCULLOCH
HUGH W. BIGGS
Attorneys for Appellant

[Endorsed]: Filed Jan. 19, 1940. [96]

And, to wit, on the 30th day of January, 1940, there was duly filed in said Court, by appellant, a Supplemental Narrative Statement of testimony, in words and figures as follows, to wit: [97]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD TO BE INCLUDED IN THE ABSTRACT

To the Clerk of the above entitled Court:

You will please include in the abstract of record and as a part of the narrative statement of the testimony the following questions propounded to and answers given by

C. H. LEONARD.

"Q. During the time that you had possession and management and the control of these properties for Mr. Bennett had you accounted for the returns from the land at all times?

A. I have.

Q. How?

A. By applying the receipts that I got to the payment of taxes and payment of the costs and expenses due, the payment of Federal Land Bank installments and interest when I could get any to be applied I did that. But here was the thing, Could not pay the interest on my mortgage and pay the Federal Land Bank and the taxes, too. (p. 31 Trans. of Test.)

Q. Why?

A. Because the conditions of the crops that we got off the land and the low price of hay would not do it. So we had to keep the Federal Land Bank in pretty good standing.

Q. All that you received from the properties of Mr. Bennett was applied to those things that you named?

A. Yes, it has all been paid out. (p. 32, Trans. of Test.) [98]

Q. Will you please produce a record that will show the amount of hay that was raised during the year 1931.

A. I do not know that I can here. I have them down at the office, I think. There were 217 tons; now there was 38 tons that was cut on the Thorn-

burg place, that was the Hughet contract. There was 179 tons that was cut on the Swick place, making 217. (p. 57, Trans. of Test.)

J. W. McCULLOCH
HUGH L. BIGGS
Attorneys for C. M. Leonard

[Endorsed]: Filed January 30, 1940. [99]

And, to wit, on the 23rd day of March, 1939, there was duly filed in said Court, by the Conciliation Commissioner, 27th day of March, 1939, by the Clerk, Debtor's Exhibit 1, in words and figures as follows, to wit: [100]

DEBTOR'S EXHIBIT #1

C. A. Sweek and Ella S. Sweek
to
Samuel R. Bennett and Alice Bennett

Know all men by these presents, That we, C. A. Sweek and Ella S. Sweek Husband and wife, of Corvallis, Oregon of lawful age, in consideration of Five Dollars, to us paid by Samuel R. Bennett and Alice Bennett, Husband and Wife do hereby remise, release and forever quitclaim unto the said Samuel R. Bennett and Alice Bennett, his wife, and unto their heirs and assigns all our rights, title and interest in and to all that parcel of real estate situate in County of Harney, State of Oregon, to-wit:

The southwest quarter of the southeast quarter and lot four in section seven; lots four and five in section seventeen and the east half of the northeast quarter of section eighteen, all in township twenty three south, Range thirty one east of the Willamette Meridian, containing 224 acres more or less, and block fifty one in the city of Burns in said County and State.

50¢ U.S.I.R. Stamps attached and cancelled.

To have and to hold the same, with all the privileges and appurtenances thereunto belonging to said Samuel R. Bennett and Alice Bennett and to their heirs and assigns forever.

In witness whereof, we have hereunto set our hands and seals this 26th day of September A. D. 1921.

C. A. SWEEK [Seal]
ELLA S. SWEEK [Seal]

Signed, sealed and delivered in the presence of us as Witnesses:

ARDATH CRADDOCK
FRED McHENRY

State of Oregon,
County of Benton—ss.

This certifies, That on this 26th day of September A. D. 1921, before me the undersigned, a County Clerk in and for said County and State, personally appeared the within named C. A. Sweek and Ella S. Sweek, his wife who are known to me to be the identical individuals described in and who executed

the within instrument, and acknowledged to me that they executed the same.

In testimony whereof, I have hereunto set my hand and official seal the day and year above written.

[County Court Seal] FRED McHENRY
County Clerk, Benton County, Oregon

Original Endorsed: Received for Record Sept. 30, 1921 8:00 A. M. Chas. E. Dillman, County Clerk.

State of Oregon,
County of Harney—ss.

I, Wm. M. Carroll County Clerk and Clerk of the County Court of the County and State aforesaid, do hereby certify that the foregoing copy of Quitclaim Deed has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original deed as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 22 day of March, 1939.

WM. M. CARROLL,
Clerk
By ROBERTA H. VINCENT,
Deputy

[Endorsed]: Filed March 23, 1939 at 3:15 P. M. by debtor Samuel R. Bennett. R. E. Kriesien, Conciliation Commissioner for Harney County.

[Endorsed]: Filed March 27, 1939. G. H. Marsh, Clerk. [101]

C. A. Sweek and Ella S. Sweek
to
Samuel R. Bennett and Alice Bennett

This Indenture Witnesseth, That C. A. Sweek and Ella S. Sweek, his wife, for the consideration of the sum of Ten Dollars, to them paid, have bargained and sold, and by these presents do bargain, sell and convey unto Samuel R. Bennett and Alice Bennett husband and wife, the following described premises, to-wit:

> The Southwest quarter of the Southeast quarter (SW¼SE¼)) and Lot Four (4) in Section Seven (7), Lots Four (4) and Five (5) in Section Seventeen (17), the East Half of the Northeast quarter (E½NE¼) of Section Eighteen (18), all in Township Twenty three south, Range Thirty one E.W.M.; also all of Block Fifty one (51) in the Second Addition to Burns, Barney County, Oregon;

Together with all water rights, dams and ditches used in connection therewith or appurtenant thereto.

This is a correction Deed. The above described property having been heretofore conveyed to the above named purchasers.

To have and to hold the said premises, with their appurtenances unto the said Samuel R. Bennett and Alice Bennett, their heirs and assigns forever, and we the said C. A. Sweek and Ella S. Sweek do hereby covenant to and with the said Samuel R. Bennett and Alice Bennett, their heirs and assigns,

that we are the owners in fee simple of said premises; that they are free from all incumbrances subject to all liens of record against said property and that we will warrant and defend the same from all lawful claims whatsoever, except such liens as appear of record against said property.

In witness whereof, we have hereunto set our hands and seals this 2nd day of December, A. D. 1921.

C. A. SWEEK [Seal]
ELLA S. SWEEK [Seal]

Signed, Sealed and Delivered in the presence of us as Witnesses:

ALEX D. SWEEK
ARDATH CRADDOCK

State of Oregon,
County of Benton—ss.

Be it remembered, That on this 2nd day of December, A. D. 1921, personally appeared before me, a Notary Public in and for said County and State, the within named C. A. Sweek and Ella S. Sweek, husband and wife, personally known to me to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

[Seal] FRED M. HENRY
County Clerk of Benton County, Oregon

Original Endorsed: Received for Record December 13th, 1921 11:20 A. M. Chas. E. Dillman, County Clerk. [102]

State of Oregon,
County of Harney—ss.

I, Wm. M. Carroll, County Clerk and Clerk of the County Court of the County and State aforesaid, do hereby certify that the foregoing copy of Warranty Deed, given by C. A. Sweek and Ella S. Sweek to Samuel R. Bennett and Alice Bennett has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original Deed as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 22 day of March 1939.

[Seal] WM. M. CARROLL,
Clerk
By ROBERTA H. VINCENT,
Deputy

[Endorsed]: Filed March 27, 1939. [103]

#26278

Homer B. Mace et ux.
to
Samuel R. Bennett

This Indenture Witnesseth, That Homer B. Mace and M. E. Mace, his wife, for the consideration of

the sum of Ten Dollars, to them paid, have bargained and sold, and by these presents do bargain, sell and convey unto Samuel R. Bennett the following described premises, to-wit:

The east one-half of the southwest quarter of section eight (8) in township twenty-three (23) south of range thirty-one (31) east of Willamette Meridian, Harney County, Oregon, containing eighty (80) acres, together with all water and water rights appurtenant thereto.

($6.00 U.S.I.R. Stamps affixed and cancelled)

To have and to hold the said premises, with their appurtenances unto the said Samuel R. Bennett, his heirs and assigns forever, And we the said Homer B. Mace and M. E. Mace, grantors above named, do hereby covenant to and with the said Samuel R. Bennett, grantee herein, his heirs and assigns, that we are the owners in fee simple of said premises; that they are free from all incumbrances and that we will warrant and defend the same from all lawful claims whatsoever.

In witness whereof, we have hereunto set our hands and seals this 28th day of April, A. D. 1925.

HOMER B. MACE [Seal]
M. E. MACE [Seal]

Signed, Sealed and Delivered in the presence of us as Witnesses:

VELLA M. WELCOME
E. H. CONSER

State of Oregon,
County of Harney—ss.

Be it remembered, That on this 29th day of April A. D. 1925, personally appeared before me, a Notary Public in and for said County and State, the within named Homer B. Mace and M. E. Mace, his wife, personally known to me to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate, written.

[Notarial Seal] imp. E. H. CONSER
Notary Public for Oregon

My Commission expires March 23, 1929.

Original Endorsed: Received for record April 30th 1925 at 10 o'clock A. M. Chas. E. Dillman, County Clerk. By Wm. M. Carroll, Deputy.

State of Oregon,
County of Harney—ss.

I, Wm. M. Carroll County Clerk and Clerk of the County Court of the County and State aforesaid do hereby certify that the foregoing copy of Warranty Deed has been by me compared with the original and it is a correct transcript therefrom, and of the whole of such original Deed as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my

hand and affixed the seal of said court this 22nd day of March 1939.

[Seal] WM. M. CARROLL,
Clerk
By ROBERTA H. VINCENT,
Deputy

[Endorsed]: Filed March 27, 1939. [104]

#29480

Cary Thornburg et ux
to
Samuel R. Bennett et ux

Know all men by these presents, That we, Cary Thornburg and Rose E. Thornburg his wife, of Burns, Harney County, Oregon in consideration of ten ($10.00) Dollars, to us paid by Samuel R. Bennett and Alice Bennett, his wife of Burns, County of Harney, State of Oregon, have bargained and sold, and by these presents do grant, bargain, sell and convey unto Samuel R. Bennett and Alice Bennett, his wife, their heirs and assigns, all the following bounded and described real property, situated in the County of Harney and State of Oregon: viz:

The east half of Southwest quarter and lots three and four in section thirty, all in Township twenty three south, Range thirty one east of the Willamette Meridian, containing 160 acres more or less.

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all our estate, right, title and interest in and to the same, including dower and claim of dower.

To have and to hold, the above described and granted premises unto the said Samuel R. Bennett and Alice Bennett their heirs and assigns forever. And we the grantors above named do covenant to and with Samuel R. Bennett and Alice Bennett the above named grantees their heirs and assigns that we are lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances, except liens of record. And the land is sold and this deed given subject to all of such liens and that we will and our heirs, executors and administrators, shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever excepting the liens above mentioned.

In witness whereof, the grantors above named, have hereunto set their hands and seals this 18th day of January, 1927.

CARY THORNBURG [Seal]
ROSE THORNBURG [Seal]

Executed in the presence of
E. H. CONSER
GLADYS G. HOLLAND

State of Oregon,
County of Harney—ss.

Be it remembered, That on this 18th day of January A. D. 1927, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Cary Thornburg and Rose E. Thornburg, his wife, who are known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In testimony whereof, I have hereunto set my hand and official seal, the day and year last above written.

[Notarial Seal] imp. E. H. CONSER
Notary Public for Oregon

My Commission expires Mar. 23, 1929.

Original Endorsed: Received for record Jan. 18, 1927, at 1:20 o'clock P. M. Charles E. Dillman, Recorder of Conveyances. By Wm. M. Carroll, Deputy. [105]

State of Oregon,
County of Harney—ss.

I, Wm. M. Carroll County Clerk and Clerk of the County Court of the County and State aforesaid, do hereby certify that the foregoing copy of Warranty Deed #29480—Cary Thornburg et ux to Samuel R. Bennett et ux has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original War-

ranty Deed as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 21 day of March, 1939.

[Seal] WM. M. CARROLL,
Clerk
By ROBERTA H. VINCENT,
Deputy

[Endorsed]: Filed March 27, 1939. [106]

#39207

Samuel R. Bennett et ux
to
Bennett Realty Company

This Indenture, made by and between Samuel R. Bennett and Alice Bennett, his wife, Grantors and Bennett Realty Company, a corporation, Grantee

Witnesseth: That said grantors for and in consideration of the sum of Ten Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed, and by these presents do hereby remise, release and forever, quitclaim unto the said grantee its successors and assigns, the following described real property, in Harney County, State of Oregon, to-wit:

The Southeast quarter (SE¼) of Section 31, Twp. 19 S. R. 31 E. W.M.; the East half of the Northeast quarter (E½NE¼) of Section

18, and lots 4 and 5 of Section 17, all in Township 23 S. Range 31 E. W.M.; the East half of the Southwest quarter (E½SW¼) and Lots 3 and 4 of Section 30, in Township 23 S. Range 31 E. W.M.;

Tracts No. 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 in Mace Acreage Tracts as the same appear on the plat of the same duly filed in the office of the County Clerk of Harney County, Oregon; Lots 4, 5, 6, 7, and 9 of Block 1; Lots 4, 5, and 6 of Block 2; Lots 1, 2, 3, 4, 5 and 6 of Block 5; Lots 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12 of Block 6; Lots 1, 2, 3, 4, 5, and 6 of Block 11; and all of Blocks 3, 4, E, 7, 8, 9, 10, 12, G, H, 13, 14 and 15, all in Bennett's Second Addition to Burns, Harney County, Oregon, as the same appear on the plat of the same duly filed in the office of the County Clerk of Harney County, Oregon.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all their estate, right, title and interest in and to the same.

To have and to hold the said premises, with their appurtenances, unto the said grantee, its successors and assigns forever.

In testimony whereof, we have hereunto set our hands and seals this 14th day of August, 1931.

SAMUEL R. BENNETT [Seal]
ALICE BENNETT [Seal]

Executed in the presence of

State of Oregon,
County of Harney—ss.

Be it remembered, That on this 14th day of August, A. D. 1931, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Samuel R. Bennett and Alice Bennett, his wife, who are known to me to be the identical individuals described in and who executed the written instrument, and acknowledged to me that they executed the same freely and voluntarily.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

[Notarial Seal] Imp. CHAS. B. FOLEY
Notary Public for Oregon

My Commission expires Jan. 22, 1932.

Original Endorsed: Received for Record Sept. 21, 1931, at 9:45 o'clock A. M.

WM. M. CARROLL,
County Clerk
By WALTER R. POWELL,
Deputy [107]

State of Oregon,
County of Harney—ss.

I, Wm. M. Carroll County Clerk and Clerk of the County Court of the County and State aforesaid, do hereby certify that the foregoing copy of Quitclaim Deed #39207, given by Samuel R. Bennett et ux to Bennett Realty Company has been by me compared

with the original, and that it is a correct transcript therefrom, and of the whole of such original Deed as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 22 day of March, 1939.

[Seal] WM. M. CARROLL,
Clerk
By ROBERTA H. VINCENT,
Deputy

[Endorsed]: Filed March 27, 1939. [108]

#53914

Alice Bennett
to
Samuel R. Bennett

Know all men by these presents, That Alice Bennett in consideration of One and no/100 Dollars, to me paid by Samuel R. Bennett do hereby remise, release and forever quitclaim unto the said Samuel R. Bennett, her husband and unto his heirs and assigns all my right, title and interest in and to the following described parcel of real estate, together with the tenements, hereditaments and appurtenances, situate in Harney County, State of Oregon, to-wit:

All of Lots 4 and 5 of Section 17; and the E½ of NE¼ of Section 18 in Township 23 S. R. 31, E. W. M.; and

The SE¼ of Section 31 in Township 19 S. R. 31 E. W. M.: and Lots 3, 4, and 5 and SE¼ of NW¼ of Section 6 in Township 20 S. R. 31 E. W. M.; and

The E½ of SW¼ and Lots 3 and 4 in Section 30, Township 23, S. R. 31, E. W. M.; and

The E½ of SW¼ of Section 8, Township 23, S. R. 31, E. W. M.; (save and excepting therefrom Tracts or Lots 2, 3, 4, and 5, containing and consisting of 5 acres each) all of said lands being in Harney County, Oregon, together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including any and all water rights of every kind and description, however evidenced, appurtenant to the same, or any part thereof, and any and all dams, ditches and other appliances connected with or pertaining in any way to the irrigation of said lands, or interests therein, or rights thereto, and any credits or stocks in the National Farm Loan Association in connection with the Federal Land Bank Mortgages on the said lands.

To have and to hold the same to the said Samuel R. Bennett and to his heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal this 25th day of February A. D. 1939.

ALICE BENNETT [Seal]

State of Oregon,
County of Harney—ss.

On this the 25th day of February, A. D. 1939, personally appeared before me, a Notary Public in and for said County and State the within named Alice Bennett to me personally known to be the identical person described therein and who executed the within instrument, and acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein named.

In testimony whereof, I have hereunto set my hand and official seal the day and year last above written.

[Notarial Seal] imp. ARCHIE WEINSTEIN
Notary Public for Oregon

My Commission expires April 24, 1939.

Original Endorsed: Received for Record February 25th, 1939, at 1:30 o'clock P. M.

WM. M. CARROLL,
County Clerk
By CURTIS SMITH,
Deputy [109]

State of Oregon,
County of Harney—ss.

I, Wm. M. Carroll County Clerk and Clerk of the County Court of the County and State aforesaid, do hereby certify that the foregoing copy of Quitclaim Deed #53914, Alice Bennett to Samuel R. Bennett has been by me compared with the original,

and that it is a correct transcript therefrom, and of the whole of such original Deed as the same appears of record at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 22 day of March, 1939.

[Seal] WM. M. CARROLL,
Clerk.
By ROBERTA H. VINCENT,
Deputy.

[Endorsed]: Filed March 27, 1939. [110]

And, to wit, on the 24th day of January, 1940, there was duly filed in said Court, by the Appellee, an Amended Designation of additional portions to be included in the transcript; narrative statement of additional testimony, and Exhibits, in words and figures as follows, to wit: [111]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF ADDITIONAL PORTIONS TO BE INCLUDED IN THE RECORD ON APPEAL.

To the Clerk of the Above Entitled Court:

Since debtor filed the "Designation of Additional Portions to be Included in the Record on Appeal", appellant has served an "Amended Statement of Points on which Appellant Intends to rely on Ap-

peal" and "Amended Narrative Statement of the Testimony". By reason thereof, debtor now files this amended designation.

The debtor's amended designation includes the substance of appellant's narrative for the reason that it is impossible to supplement appellant's narrative statement by amendments thereto.

In making up the record on appeal in the above entitled cause to be docketed in the United States Circuit Court of Appeals, you will please include the following documents and testimony in addition to those designated by appellant, to-wit:

1. Include Schedule B-1 in the schedules of December 20, 1938.

2. Include the amended proposal of composition and extension dated May 13, 1939, and filed with the Conciliation Commissioner on May 15, 1939.

3. Include the narrative of testimony attached hereto, marked Exhibit "A", or in lieu thereof, all of the testimony in question and answer form of the witnesses

Samuel R. Bennett—P. 1 to 24 inclusive,
P. 108 to 129 inclusive.
[112]

Mrs. Alice Bennett—P. 25 to 29.

C. H. Leonard—p. 32, Lines 28 to 34 inclusive,
p. 65, Lines 24 to 34 inclusive,
p. 66, Lines 1 to 5 inclusive,
p. 102 to 104 inclusive,
p. 146 to 151 inclusive.

Clyde Cowing—p. 86 to 89.

4. Include portions of the exhibits received in evidence as follows:

(a) The portion of Exhibit "A" (Circuit Court file) consisting of the Complaint, Affidavit for Default, Decree, and Objections to Confirmation of Sale, omitting titles.

(b) Exhibit 2 (Certificate of Dissolution of Corporation).

(c) Exhibit 4 (Itemized statement of account).

Dated this ..... day of January, 1940.

S. J. BISCHOFF
PAT H. DONEGAN
Attorneys for Debtor-Appellee,
Samuel R. Bennett. [113]

EXHIBIT "A".

EXCERPTS FROM TESTIMONY TO BE INCLUDED IN RECORD.

SAMUEL R. BENNETT

testified on February 25, 1939, as follows:

I am 51 years of age. Have lived in Burns practically all of my life; I am married; my wife's name is Alice; I have four children, two girls, 23 and 25 years of age, and two boys, 15 and 16 years of age. Married 26 years. Born in Harney County. I have been connected with farming and livestock all my life. My father was in livestock business in Harney County. In 1901 we moved to Silvies Valley with him. I was about 15 years old. I remained there until I went away to school. I went into the Forest

(Testimony of Samuel R. Bennett.)

Service in 1909. My father raised stock and grain. He had about 200 acres. I worked on my father's ranch until I was 24 or 25 years of age. I was in the Forest Service 15 years. During the time I was in the Forest Service, I was engaged in farming. I had a 160 acre ranch up the river and some stock. The principal crop was truck farming, potatoes and alfalfa. I had 20 head of stock. I farmed during that time through hired help. My brother worked at the ranch.

My wife's father was C. H. Swick. He had land near Burns close to town, part inside of the city limits. It is part of the land described in my schedules. I acquired the land in 1921 while I was still in the Forest Service. The Swick land was all in wild hay meadow, except 40 acres. There were two tracts, 145 and 80 acres each, 225 acres in all. All but 40 acres was plow land, wild hay and grain. That place put up from 250 to 300 tons of wild hay and 40 acres good grain land. From 30 to 50 bushels to the acre. When I purchased the land from Mr. Swick, I took over the mortgages and paid up a lot of debts. Mr. Leonard had a mortgage for $6000 which is not involved here. When I took [114] over the Swick land, I put in about $600. I put in about $2000 from time to time. The land was deeded in 1921. My wife was joined in the deed. She did not put in any money.

Afterwards I acquired other land. Two tracts. The Thornburg Place, 160 acres, and the Mace

(Testimony of Samuel R. Bennett.)

acreage. The Thornburg Place was the same type of land as the Swick place except a small portion was sage brush. I assumed the Federal Land Bank indebtedness. I got the Mace land about 1924. I paid $75.00 an acre. It was 80 acres, total $6000. I paid down to $2000. The Mace land is about the same character as the Swick and Thornburg lands. The three places produce an average of 500 tons of hay.

I came to Burns to live in 1921. I quit the Forest Service in 1924. From that date I devoted all of my time to conducting that land. I started with a dairy. For several years I had about 60 cows and put up hay. When I purchased the Thornburg place, I also took over about 30 head of dairy cows. Besides the 60 head of milk cows, I had 75 head of cows for breading. I sold quite a lot of beef. My income from dairy cows ran from $200.00 to $300.00 a month. About $250.00 in winter months and $300.00 a month in summer. Little income from other sources. I was buying and selling cattle and sold hay. I paid off the $6000 mortgage which was on the Swick land in 1921.

I moved off this land in the spring of 1930. At that time there was owing the Federal Land Bank $7000. Mortgage was on the Swick place alone. There was $4000 on the Thornburg place. It was paid down to $3500 or $3600. I had a lot of debts. When I bought the Swick place from my father-in-law, Mr. Swick, he gave me two deeds, a quit-

(Testimony of Samuel R. Bennett.)

claim and a property deed. As a result of litigation, I moved away from the land. I became involved so heavily and had so much against the land. There was a mortgage on my cattle. I got a chance to go into a big ranch in the south end of the county and I left the land to Mr. Leonard to sell the crop and apply all the [115] money on the mortgages as they became due. I had 160 head of cattle.

Q. When you turned this land over to Mr. Leonard, did you intend to give the land to him or was it your idea to return to it?

A. I intended to return whenever I got in a place where I could. I turned over all of the money from the crops to the indebtedness.

Q. Did you figure if you made any profits on Trout Creek that you would pay it on that?

A. Yes, but we struck five dry years.

Q. You lost the cattle that you had?

A. Yes sir.

Q. When you lost the cattle that you had you returned to this country? A. Yes sir.

Q. Mr. Leonard was still conducting your operations here? A. Yes.

Q. By this time this land had become pretty heavily involved in indebtedness?

A. Yes sir.

Q. What time did you come back?

A. It was the spring of 1934 or 1935.

Q. What was the mortgages on the land in 1934 and 1935, do you know?

(Testimony of Samuel R. Bennett.)

A. Around $18,000.00.

Q. That included the Federal Land Bank mortgage and Mr. Leonard's mortgage?

A. Yes sir.

Mr. Leonard has had possession of the land since 1930. He was to run the land and apply the income upon the indebtedness while I was down at Trout Creek. I left Trout Creek in the spring [116] of 1934 or 1935. The Federal Land Bank mortgage was about $10,000. I owed Mr. Leonard about $8000 at that time. When I came off the Trout Creek land, the indebtedness against the land increased to a point where it was impossible for me to take it up. Mr. Leonard brought suit to foreclose the first of January. The Federal Land Bank mortgage was reduced by $2700, proceeds of fire insurance policies. While Mr. Leonard had possession of the place, he made payments to the Federal Land Bank. The balance owing to the Federal Land Bank is $6000.

In 1934 I filed Articles of Incorporation for Bennett Realty Company. It was the intention to deed the Swick land, Mace land and Thornburg land to the corporation. I think there was some property left out. The piece up the river. The stockholders were myself and my wife. The annual license fees were not paid. As a result, the corporation was dissolved. I was informed by Mr. Foley, our attorney, that the property would all be turned back to my wife and myself.

(Testimony of Samuel R. Bennett.)

Outside of the property up the river, all the money that was furnished in these tracts to the Bennett Realty Company was furnished by me. My wife did not furnish any money of her own.

When I went to Trout Creek, I did not go with the intention of staying there permanently. I went with the intention of returning here whenever I could get my debts worked out. I was going to return to my farm lands. I had the house there all the time. I am employed as a District Grazier at present. Since about a year last May, at a salary of $1860 a year. If the Court were to make an order setting apart this land for a period of three years, I would not resign my job; I would hire help. If, however, I was financially able, I would return to the ranch.

On

Cross Examination,

Bennett testified:

I don't know what the total indebtedness is for sure. $6000 to the Federal Land Bank and $10,000 to Mr. Leonard. There [117] have been some credits there. I bought the land from Mr. Swick in 1921 and took possession of it at that time. I farmed it and harvested the crops in 1921 and every year after it was deeded to me. I think I did in 1921. Until the spring of 1930. Mr. Leonard has operated the place since. Under the understanding that all receipts from the land were to be turned over to

(Testimony of Samuel R. Bennett.)

the indebtedness. He would pay the interest and taxes out of the crops and harvest, and the expense of irrigation, etc. My understanding with Mr. Leonard was that he should operate the lands and harvest the crops and turn the net proceeds in on the indebtedness. That meant to the Federal Land Bank. When that agreement was made, I moved to the south part of the county, about 150 miles from Burns on Trout Creek. We bought a small tract of land. The largest part of it was leased land. I stayed there about five years. Five crops. That ranch was my exclusive business for five years.

Q. You had no other income except what that ranch brought and what the one that Mr. Leonard run brought? A. No.

The dairy cows that were on the Swick place were run on the Trout Creek place. During the five years I was on the Trout Creek place I struck five dry years. It was a losing proposition on account of the drought. The land that was being farmed by Mr. Leonard was always a sure shot for water. I don't know what income was derived from that land. The income was supposed to be applied on the indebtedness to the Federal Land Bank and to Mr. Leonard. He kept all of the records so I don't know just what the income was. I stayed out on the Trout Creek ranch from about 1930 to 1935. Then I moved back here and run cattle for my daughter for about a

(Testimony of Samuel R. Bennett.)

year. I have lived in the vicinity of Burns ever since. From the time I came back to Burns until I took the grazing position, I was contracting in the summer for hay and run these cattle for my daughter. I wasn't working on the Swick land at that time. Mr. [118] Leonard was operating under the agreement that he had with me, that the income would be applied on the indebtedness. The Thornburg place lies about three miles from the Swick land. That was included in the arrangement with Mr. Leonard. There was a mortgage against it also to the Federal Land Bank. Mr. Leonard had been in possession of these places, running them, since 1930 when I moved to Trout Creek. The dairy cows were turned back on the mortgage and the beef cows were sold. That was the year before I left Trout Creek, about 1934. I have had a couple of milk cows since. During 1934 I was in the real estate business, but I was farming during that time on Swick land. When I was farming on the Swick land, I had work horses, plows, harrows, mowing machines, milking machines. They were sold in 1934. Since then I have a lot of harness, saddles, small tools, etc. At the present time I own 300 acres of meadow land, two cows, some work horses and saddle horses. In 1929 I was in the real estate business, but I had a man handling the real estate. I did the work on the ranch. I farmed that until I went to Trout Creek. When I bought the Swick

(Testimony of Samuel R. Bennett.)

place, there was a $6000 mortgage on it to Mr. Leonard. I paid *of* Mr. Leonard $6000. About $9000 including interest. I paid him off from the sale of lots.

The Bennett Realty Company has been done away with long ago. The land was turned back to me and my wife.

Q. You finally quit the Trout Creek Company and came back up here and lived for a while then you got a job with the government as District Grazier and your salary was $1,860.00 and you have been working about 18 months?

A. Yes sir.

Q. You are still drawing that salary and still perform the service of the District?

A. Yes sir.

Q. If this land should be turned back to you, you would [119] not devote your personal attention to it, but would personally direct the running of it?

A. Yes personally direct it.

Q. You said that it would be your intention eventually to take the land back and farm it yourself. Do you have any time in mind when you would take it back?

A. I wouldn't say that I could set any time for sure.

Mr. Kriesien: Your present income since you have been employed by the Division of Grazing has been from your salary? A. Yes.

(Testimony of Samuel R. Bennett.)

Mr. Kriesien: At no time have you been deriving any income from the farming of the land within the last eighteen months since you have been employed by the Division of Grazing?

A. I have had a lot of cattle during that period and have done some farming.

Mr. Kriesien: What has your income been from your farming operations since the time that you entered the employ of the government?

A. My personal living expenses and bills have all been paid by my salary.

Mr. Kriesien:

Q. Can you estimate how much income you have derived from farming? A. No sir.

Mr. Kriesien: Have you personally engaged in farming since you have been employed by the United States government?

A. I have not personally done any farming myself.

Mr. Kriesien: Have you done any farming lately?

A. I am running a place on the lake for my daughter and had a bunch of cattle last winter.

Mr. Kriesien: How is that being run?

A. Hired help. [120]

Mr. Kriesien: Were you the administrator?

A. Yes sir.

Mr. Donegan: I believe you stated that when you were operating your dairy that your income was in the neighborhood of $300.00 per month at times?

A. Yes sir.

(Testimony of Samuel R. Bennett.)

Mr. Donegan: Besides the money that you received from the sale of lots was any of this money used to pay back the $6,000 mortgage to Mr. Leonard?

A. It was paid before I went into the dairy business.

Mr. Donegan: Where is your home here in Burns with reference to the Swick land?

A. It is on part of the Swick land. This house is on one of the lots. About 300 yards from the Swick meadow.

Mr. Donegan: When you turned the land over to Mr. Leonard to run for you I presume he derived his present revenue from the sale of hay on the land? A. Yes.

Mr. Donegan: Did he farm the land personally?

A. No, he hired help. He may have done some of the irrigating himself, but most of the hay was put up on a crop sharing basis.

Mr. Donegan: You testify the land produced an average of 500 tons of hay. Are you familiar with the value of hay in this country for an average year? A. Yes sir.

Mr. Donegan: What would be the value of hay during the period that Mr. Leonard had it in his possession?

A. Average around $6.00. Sometimes a little more or less, but it always sells well.

Mr. Donegan: So that if he farmed the land by hired help and it raised an average of 500 tons a

(Testimony of Samuel R. Bennett.)

year, you would have a gross [121] income of about $3,000.00?

A. Or a smaller gross income if it was done on shares.

Mr. Donegan: This money that Mr. Leonard received was applied on the Federal Land Bank mortgage which he paid and upon the taxes and I presume upon the interest on the mortgage?

A. Yes sir.

Mr. Donegan: Did you ever receive any record of accounting from Mr. Leonard? A. No sir.

Mr. Donegan: Did you ever ask for one?

A. I have a good many times.

Mr. Cook: What period of time do you include, Mr. Bennett, in the time that you say that hay was of the value of $6.00 per ton?

A. Average value of hay during that period.

Mr. Cook: You never got a statement from Mr. Leonard? A. No sir.

Mr. Cook: You never had a conversation with him as to what the situation was?

A. In a general way.

Mr. Cook: You knew approximately how much there was due on those two mortgages all the time, did you not?

A. I had some idea. It was pretty hard to tell just exactly. I never knew how much he had sold.

Mr. Cook: Did he refuse to tell you?

(Testimony of Samuel R. Bennett.)

A. He never gave me a statement though I asked for statements.

Mr. Cook: How much did you believe was against the property?

A. The general statement was about $19,000.00.

Mr. Cook: That was all the mortgages put together? A. Yes.

Mr. Cook: After you came back here from Trout Creek you [122] lived here in Burns?

A. Yes sir.

Mr. Cook: Mr. Leonard lived here in Burns and you saw him at times did you not?

A. Yes sir.

Mr. Cook: Did you inform him that the method of conducting the business was unsatisfactory to you in any way?

A. No I didn't. I wasn't in a position to make a kick; I asked for an accounting several times, but I never did get it.

My family consists of two boys and two girls. The two boys are capable of assisting in the operation of the ranch. They have experience in ranching. They have been raised on a ranch and understand working on a ranch. They have done haying. They would engage in assisting me in farming these ranches and handling of the ranches. I regard them capable of engaging in haying operations. They are very capable boys for their age. They have had experience in irrigation. They are capable of irri-

(Testimony of Samuel R. Bennett.)
gating ranches of this kind. If I obtained possession of the ranch, the boys would partake in the management and handling of the ranch. If I obtained a three year stay under these proceedings,, I would not have to withdraw any of the revenue from the operation of the ranches for living expenses.

I testified in February, 1939, at the first meeting of creditors that if I was granted the extension, that I would operate this property with hired help. I was going to operate it with my family. I am still employed as a District Grazier. District No. 4.

[123]

MRS. ALICE BENNETT

testified:

I am the wife of Samuel R. Bennett. I was secretary of the Bennett Realty Company. I lived in Burns since I was four years old. When we were married Mr. Bennett was in the Forest Service. He bought the property up the river before we were married. He conducted farming operations upon that property for a number of years after we were married before he sold it. In 1921 Mr. Bennett purchased the land from my father. I did not pay anything on the purchase price. We moved to Burns in 1921. Mr. Bennett stayed with the Service until 1924, then moved down here and engaged in farming this land. Farming consisted of running a dairy

(Testimony of Mrs. Alice Bennett.)

and putting up hay. We had 25 to 30 cows in the barn. 60 heads of dairy cows. He fed beef cattle. I did not contribute any money towards the purchase of the Mace property or to the Thornburg place. While the deed to the Swick property was made to Mr. Bennett and myself, I did not consider that I was the real owner of the land. Mr. Bennett was the real owner and manager. I had a homestead before I was married. After I was married, we traded it for grazing purposes. Mr. Bennett went to Trout Creek in 1930 and I stayed here another year and went in 1931. During that year Mr. Leonard managed the land.

Q. Can you state how the management was turned over to Mr. Leonard, and for what reason?

A. Well, we knew if we kept our cows here and they ate up the forage that it could not be applied on the mortgage and the cows were already mortgaged so we thought if we left, some day we could come back again.

Q. Was it your intention when you went to Trout Creek to return to farm this land if you were financially able?

A. Yes, we always had our home here.

Q. It became apparent that you would not be financially able to return here both on account of bad weather you had at Trout [124] Creek and cattle going down to $24.00 per head?

A. Yes sir.

. . . . . .

(Testimony of Mrs. Alice Bennett.)

Q. What has been Mr. Bennett's occupation generally throughout his life time?

A. Stock raising and farming.

Q. When you were on the farm did you do any work outside of housework? A. No.

. . . . . .

Mr. Cook: You say that when you and Mr. Bennett went to Trout Creek in 1930 and 1931 it was your intention to return to this land here in question and live on that land and farm it?

A. Yes.

Mr. Cook: When did you give up that intention?

A. We never gave it up.

Mr. Cook: Did you move back to it?

A. No, but we are living in the house that is on the land. We are living in the house that we lived in when we run the ranch.

Mr. Cook: The house in which you lived and which you now live was on the Swick land that is involved in this case?

A. It is the same house.

Mr. Cook: You haven't given up the idea of returning to the land, when do you plan to do this?

A. That will be up to the court, I guess.

Mr. Cook: I suppose that the proposition that Mr. Bennett submitted, if that would be accepted and go through, you would then farm the land? When do you think you would do this?

A. I don't know as there is any definite time.

(Testimony of Mrs. Alice Bennett.)

Mr. Cook: Mr. Bennett has submitted the proposition to his creditors for them to accept or reject; if they should accept [125] it would you intend to move back? A. Yes. [126]

C. H. LEONARD

testified:

I took over these lands in about 1930 to manage for Mr. Bennett. I managed them up to the present time. I am still operating this land.

In 1932 I took off 581 tons of hay. In 1933 I had 578 tons and 49 tons on the lots. There was over 600 tons in round numbers. That was the big year. In 1934 there was practically nothing. In 1935 the figures show about 600 tons. In 1936 there was practically in round numbers 450 tons. In 1937, 529 tons. In 1938, 432 tons.

This year's total taxes on the property was $402.00. The taxes average about $450.00 a year. The expenses outside of haying would be about $200.00 a year. This would include repairing fences, clearing ditches, putting in dams, and irrigating. When the haying is contracted out, the cost is $2.00 a ton for cutting and stacking and closing the corrals if there isn't any extra work in construction of corrals. These are all of the expenditures that an owner would be out during a normal year's operations.

(Testimony of C. H. Leonard.)

On examination by counsel for C. H. Leonard, he testified:

Q. There has been filed in this a cause a document entitled "Debtor's Amended Proposal for Composition and Extension". Have you examined that document? A. I have.

Q. Do you now accept or reject that offer?

A. I reject that offer.

The sheriff's sale of the property took place January 30th of this year, and subsequent to that date I claimed ownership of the land subject to statutory equity of redemption. It was originally advertised for sale on December 31, 1938. That date was subsequent to the filing of the debtor's petition in this proceeding before the time set for the sale. Notice was served on the [127] sheriff that the petition had been filed. I was aware of that before the date of the sale. I knew that.

Q. Mr. Leonard, notwithstanding your knowledge of the filing of the petition in this proceeding, you insisted that the sheriff should conduct a sale did you not?

Mr. Leonard: I would not say that I insisted. I will say that upon the advice of the District Attorney of Harney County and Mr. Duncan, as well as the sheriff, the sale was made and I bid the property in.

Mr. Duncan was acting in the capacity of my attorney. Mr. Cook was one of the attorneys for the plaintiff in the foreclosure proceeding but not an

(Testimony of C. H. Leonard.)

active attorney. He was attorney of record in this very proceeding in connection with this testimony. He entered his appearance on the papers that were filed. The District Attorney that I referred to was Mr. Cook. After the sale, I made application to the Circuit Court for confirmation. Objections were interposed on the ground that this proceeding is pending. The Circuit Court has not passed upon the application to confirm the sale because of this proceeding. That is the present status of the alleged sale.

Q. Do I understand you correctly that your first reason of objection is predicated on the ground that it does not provide for payment in full of the moneys provided for in the alleged judgment that you rely on? A. Yes.

Q. In other words you wouldn't consent to any composition of any kind unless it provided for payment in full?

A. I didn't say that.

Q. Do you say that now?

A. I simply said that that is my ground for the objection that is filed.

Q. I will ask you now whether you would consent to any [128] proposal for composition and extension which did not make a provision for payment to you in full of all the moneys provided for in the judgment that you rely on?

A. I can't say at this time what I would do until some proposal was made.

(Testimony of C. H. Leonard.)

Q. Are you willing to state for the record now what proposal you would accept in satisfaction of the moneys you claim under the alleged judgment in the foreclosure proceedings?

A. I am not making any proposals to the debtor in this matter. [129]

CLYDE COWING

testified:

I live five miles north of Burns, Oregon. I have lived in this county forty-eight years. My occupation is rancher and stock raising. I have had considerable experience in the production of hay. I know the land involved in this proceeding. I am acquainted with Mr. Leonard. I put up hay on this land in 1932. It produced 580 to 586 tons. When hay is high, the general price is from $8.00 to $10.00. I have seen hay on that land sell for $22.00 per ton. The price varies from year to year according to the quantity and demand. [130]

DEBTOR'S EXHIBIT #2 ON REHEARING

State of Oregon

Corporation Department

I, J. H. Hazlett, Corporation Commissioner and Custodian of the Seal of the Corporation Department of the State of Oregon, do hereby certify:

That I have carefully compared the annexed copy of the proclamation of the Governor of the State of Oregon dissolving, among other domestic corporations, Bennett Realty Company, and repealing and revoking its articles of incorporation, with the original proclamation of the Governor of the State of Oregon, issued January 7, 1935, which proclamation was filed in the office of the Corporation Commissioner of the State of Oregon on the 7th day of January, 1935, and find the same to be a full, true and complete transcript therefrom and of the whole thereof, insofar as it relates to the dissolution of the said Bennett Realty Company and no other.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the seal of the Corporation Department of the State of Oregon.

Done at the Capitol, at Salem, Oregon, this 9th day of May, 1938.

[Seal] J. H. HAZLETT
Corporation Commissioner. [131]

PROCLAMATION

Whereas, Charles H. Carey, Corporation Commissioner of the State of Oregon, as required by Section 25-250, Oregon Code 1930, did on the seventh day of January, 1935, report to me as the Governor of the State of Oregon, a list of all of the corporations organized under the laws of the State of Oregon for gain, which for two consecutive years or more next preceding the said seventh day of

January, 1935, have failed, neglected or refused to furnish him, the said Corporation Commissioner, any statement required to be furnished under any law of this state, or to pay any license fee required to be paid under any law of this state; and

Whereas, said report of the Corporation Commissioner, so made as aforesaid, contains the names of the following corporations which for two consecutive years or more next preceding the date of the report have failed, neglected or refused to furnish any such statements or to pay any such license fee, to-wit:

* * * * *

Bennett Realty Company

* * * * * [132]

Now, Therefore, I, Julius L. Meier, as Governor of the State of Oregon, by virtue of the authority conferred upon me by Section 25-250, Oregon Code 1930, and under and pursuant to the terms and provisions thereof, do hereby declare each and all of the foregoing and above-named corporations dissolved, and their articles of incorporation revoked and repealed, and all powers conferred by law upon such corporations are hereby declared inoperative and void.

In Witness Whereof, I have hereunto set my hand and caused the Seal of State to be hereunto affixed at the City of Salem, State of Oregon, this

seventh day of January, in the year of our Lord One Thousand Nine Hundred Thirty-five.

[Seal] JULIUS L. MEIER
Governor

Attest:
EARL SNELL
Secretary of State.

[Endorsed]: Filed September 16, 1939. G. H. Marsh, Clerk. [133]

Marked for Identification
DEBTOR'S EXHIBIT #4

ITEMIZED STATEMENT
Leonard vs. Bennett
November 6, 1930, to December 31, 1937

Item No.	1931	Cr.	Dbr.
1	March 1, Paid F. L. B. Inst. Thornburg		$ 136.50
2	May 1, Paid ½ taxes on property		280.88
3	May 28, Paid F. L. B. Inst. #26631		227.50
4	Paid Arthur Turner hay contract		447.50
5	Paid Glen Hughet hay contract		95.00
6	Paid Interest on money advanced		20.89
7	Paid for recording		5.40
8	Paid Sept. Inst. F. L. B. Thornburg		136.50
9	Paid 1 year's int. to Fred Haines 11-6-30 note		120.00
10	Paid 1 year's int. to C. H. Leonard Do.		120.00
11	Paid C. H. Leonard on Mace note		279.48
	(This covers items up to Sept. 7, 1931.)		
12	Fred Haines, 217 tons @ 8.00	$1,736.00	
13	Fred Haines, pasture	50.00	
14	Joe Beck, pasture	61.15	
15	George Whiting, rent	22.50	
		$1,869.65	$1,869.65

[134]

Item No.			Dbr.
16	November 4, 1931,	Last ½ of taxes	$ 280.84
17		Interest on same	22.02
18	Nov. 27,	Paid F. L. B. interest	227.50
19		Interest on same	22.20
20	March 1, 1932,	F. L. B.	136.50
21		Interest	10.92
22	May 5,	First half taxes	229.00
23		Interest	24.54
24	May 28,	Paid F. L. B.	227.50
25		Interest	12.40
26	Sept. 1,	Insurance on hay	24.00
27	Sept. 29,	F. L. B. $136.50 plus 90¢	137.40
28	Nov. 5,	Last half taxes	229.12
29		Interest	10.40
30		Interest	.60
31	Nov. 27,	F. L. B.	227.50
32		Interest	21.40
33	Feb. 27, 1933	F. L. B. #24697	136.50
34		Interest	10.01
35	June 8,	F. L. B. #26631 $227.50 plus 60¢	228.10
36		Interest	11.76

Item No.				Dbr.
37	Sept.	14,	F. L. B.	118.85
38			Interest	3.90
39	Sept.	25	Insurance on hay	48.00
40			Interest	1.28
41	Nov.	16,	F. L. B. 26631	135.52
42			Interest	2.25
43			Interest	1.29
44	Nov.	16,	Dam repairs	20.00
45			Interest	1.34
46	March	24, 1934	F. L. B. #24697	80.48
47			Interest	2.50
48	May	1,	F. L. B. #26631	135.52
49			Interest	4.08
50	August	22,	F. L. B. #24697	80.48
51	August	31,	F. L. B. Additional # on principal	38.14
52	October	23,	F. L. B. #26631	115.20
53	January	12, 1935	Dam expense	5.15
54	February	21,	F. L. B.	118.81
55	March	21,	Filing fee tax suit	10.00
56	March	13,	Insurance on dwelling	24.00
57	March	20	Exp. Hotchkiss dam	10.00

Item No.				Dbr.
58	March	25,	F. L. B.	135.52
59	May	1,	F. L. B.	61.87
60	May	1,	Paid on Mace note	823.25
61	July	20,	Insurance on hay	54.00
62	Aug.	5,	Tax Mace acreage, 1932	45.68
63	Aug.	12,	Tax Mace acreage	20.10
64	Sep.	4,	Thornburg	130.81
65	Sep.	12,	Mace acreage	45.68
66	Sep.	13,	Mace acreage	9.82
67	Sep.	1,	F. L. B.—Thornburg	101.51
68	Oct.	18,	F. L. B. #26631	167.89
69	Dec.	4,	Mace acreage	9.81
				[135]
70	February	18, 1936	F. L. B. #24697	$ 101.91
71	February	28,	Taxes	593.57
72	May	1,	F. L. B. #26631	168.53
73	May	14,	Wire & Stables Thornburg	3.50
74	June	11,	2nd ¼ taxes	99.95
75	Aug.	22,	F. L. B. #24697	102.32
76	Sep.	12,	3rd ¼ taxes	99.95
77	June	12,	Wire C. H. L. Dwelling Thornburg	3.50

Item No.					Dbr.
78	Sept.	29,		Wire & staples Sweek meadow	5.00
79	Oct.	21,		F. L. B. #26631	169.18
80	Oct.	27,		Dam expense—Sweek	32.00
81	December	3,		Taxes	203.40
82	December	31,		C. H. Leonard for 6 years work	1,500.00
83	March	1,	1937	F. L. B. #24697	102.75
84	March	6,		Taxes	121.84
85	March	6,		Gravel for dam	4.82
86	April	20,		F. L. B. #26631	169.85
87	April	20,		Russell Smith dam	5.00
88	June	14,		Taxes	109.80
89	July	1,		Advanced on hay contract	500.00
90	July	1,		Well Curbing timber	10.00
91	August	20,		Advanced on hay contract	300.00
92	August	27,		F. L. B. #24697	103.18
93	Sept.	13,		Taxes	109.80
94	October	4,		Expense headgates S. M.	10.00
95	October	16,		Hurlburt on ditch	5.00
96	October	25,		F. L. B. #26631	170.54
97	December	4,		Taxes	108.94
98	December	31,		C. H. Leonard, services 1 year	300.00
99	December	6,		Back taxes	91.49
100	December	31,		Advanced balance on hay	258.00
101	December	31,		Interest charge on advance	35.81
					$10,392.57

Item No.				Cre.
			(Receipts)	
102	November	15, 1931	Rent on room dwelling	$ 5.00
103	January	1, 1932	Fred Haines, ½ hay ins	15.75
104	Feb'y	7,	August Neimi, rent on room	5.00
105	April	8,	Do	5.00
106	May	20,	Do	5.00
107	June	5,	Do	5.00
108	July	5,	Do	3.00
109	Aug.	5,	Do	3.00
110	Sep.	18,	Do	3.00
111	Oct.	24,	Crane Land & Sheep Co. Pasture	34.50
112	Oct.	24,	August Neimi, Rent on room	3.00
113	Nov.	1,	Pete Obiago, pasture	15.50
114	Nov.	14,	Frank Kine pasture Thornburg	50.00
115	Nov.	16,	Arthur Turner, pasture	15.00
116	Nov.	20,	August Neimi, rent	3.00
117	Dec.	20,	Do	3.00
118	Dec.	31,	Al Oltman 78 tons hay @ 3.50	273.00
				446.75

Item No.				Crs.
119	January	20, 1933	August Neimi, rent	$ 3.00
120	January	27,	Crane Sheep & Lamb Co., pasture	20.00
121	March	1,	Al Oltman, 66 tons hay @ $3.50	231.00
122	March	12,	August Neimi rent	2.00
123	April	15,	Do	2.00
124	April	17,	P. G. Smith hay on Thornburg	15.00
125	May	8,	August Neimi, rent	2.00
126	May	25,	Arthur Turner, pasture	10.00
127	June	20,	August Neimi, rent	2.00
128	July	10,	Do	2.00
129	Aug.	5,	Do	2.00
130	Sept.	7,	Do	2.00
131	Sept.	7,	C. H. D. part 3/5 pmt. hay Sagardoy	600.00
132	Oct.	20,	August Neimi, rent	2.00
133	Nov.	22,	Do	2.00
134	Dec.	10,	Do	2.00
				$ 899.00

Item No.					Crs.
	1934-1935				
135	January	30,		Pete Sagardoy C. H. L. part 2/3 hay	768.50
136	January	30,		Do C. H. L. part 1/2 pasture	121.25
137	March	29,		Smith & Drinkwater, rent Hicks & Brandon	25.00
138	Aug.	13,		P. L. S. Co. 214 tons hay @ $8	1,712.00
139	Dec.	11,		Pete Sagardoy 48¾ tons hay $8	390.00
140	April	14,		Rent, Hicks & Brandon	25.00
141	Dec.	9,		John Fay, C. L. H. part 3/5 12 T hay	57.60
				Rent payments for period, A. Neimi	38.00
					$ 3,137.35
142	January	20,	1936	Jap. Temple, 1″ *pamt* on 113 tons	$ 600.00
143	Feb.	10,		C. H. L. part hay sold Beck 3/5 Stack	180.00
144	Feb.	10,		C. H. L. part pasture	232.50
145	March	14,		Temple, Bal on 113 T. hay @ $7	191.00
146	May	2,		Rent, Hicks & Brandon	25.00
147	Sept.	8,		Felix Urizar, pasture	125.00
148	Sept.	12,		Walter Baker "	100.00
149	Sept.	15,		Felix Urizar "	100.00
150	Nov.	12,		Walter Baker, 91½ T. old hay, damaged	366.00
				Rent payment from A. Neimi	34.00
					$ 1,953.50

Item No.					Crs.
151	January	27, 1937	Crane Sheep & Land Co.		
			Old hay $4.50		
			(1936 & 1935 hay) New hay 5.00		1,700.00
152	Dec.	18,	Crane Sheep & land Co. 371 T. $5		1,855.00
			Rent payments from A. Neimi		9.00
153	Dec.	31,	Deficit due C. H. Leonard to bal		391.97
					$ 3,955.97
				$10,392.57	$10,392.57

[137]

ITEMIZED STATEMENT

Leonard vs. Bennett

DISBURSEMENTS

Item No.				Dr.	Cr.
154	January	1, 1938	Due C. H. L. 1937, hay on Tr. 3"		$ 15.00
155	January	4,	Filing complaint		10.00
156			Shariff's costs		.40
157	June	8,	Exp. John Wood, work on ditches		12.50
158	June	28,	Paid F. L. B., back taxes and ins		650.04
159	June	28,	Russell Smith, work on dams, team, etc		10.00
160					
161	Aug.	6,	F. L. B. bal. as per statement		33.76
162	Aug.	29,	F. L. B. interest due #24697		103.63
163	Aug.	29,	C. H. L. hay on Tr. 2, 1938		15.00
164	Sept.	7,	Wire, staples, posts etc. for corrals		5.00
165	Oct.	17,	Delinquent tax on Thornburg, paid		58.93
166	Oct.	25,	Paid F. L. B. as per statement		54.20
167	Nov.	23,	Paid taxes for amount due		465.15
168	Nov.	23,	Int. on advancements made for 1938		20.23
169	Nov.	31,	C. H. Leonard, services 1938		300.00
			RECEIPTS		
170	April	29,	Rent, Hicks & Brandon lands	$ 25.00	
171	Nov.	22,	Crane Sheep & Land Co., hay	976.00	
172	Nov.	30,	Arthur Turner for hay, (to Bal.)	350.00	
173	Nov.	30,	Advancements made by C. H. L.	393.84	
				$ 1,753.84	1,753.84

174 December 5, 1938, Paid for dam expense not in above.

175 The hay was cut and stacked for one half of the hay, leaving me the other half and the pasture, I sold 195 tons of hay to C. S. & L. Co. as stated with the pasture thrown in for $5.00 per ton. I had 158 tons of old hay at the Thornburg place that I had paid Arthur Turner $316.00 for cutting and stacking, and about 20 tons of 1938 hay. I was unable to sell the Thornburg hay in 1937 and the stacks were in poor shape for the winter was hard. Rather than lose the hay entirely from rot and damage, I sold the old hay and the 20 tons of 1938 hay to Arthur for $350.00. and in order to make the deal I took $75.00 cash and loaned him the balance.

[138]

1939

ITEMIZED STATEMENT

Leonard vs. Bennett

Item No.			DISBURSEMENTS	Dr.	Cr.
176	Feb.	27, 1939	Paid F. L. B. interest #24697		$ 104.10
177	March	13,	Taxes in full		390.21
178	April	19,	Bert Pennington, work on levees		5.00
179	April	27,	F. L. B. #26631		198.37
180	May	1,	Man & Team, dam work		5.00
181	May	6,	Ausmus Bros. Tractor ditching		10.00
182	May	7,	Bill Clark & Son, cleaning ditches		5.00
			RECEIPTS		
183	April	15,	Rent, Hicks & Brandon	$ 25.00	
				$ 25.00	$ 717.68

184 On September 1st there will be another interest due to the F. L. B. on #24697 of practically $104.10
On November 1st there will be another interest due to the F. L. B. on #26631 of practically 198.37

185 The March 1st payment on #24697 reduced the amount of that loan from $3240.41 to $3193.02, a reduction on principal of $47.39.

186 The May 1st payment on #26631 reduced the amount of that loan from $2912.69 to $2765.29, a reduction on principal of $147.40.

187 This makes a reduction in total of $194.79 on both principals.

188 You can see by this that there must be a necessary expenditure in round numbers of $1000.00 for taxes and payments due F. L. B. before any returns are likely to be received from the 1939 crop. This does not take into consideration any other interest charges or expenses as operating expenses.

[Endorsed]: Filed September 16, 1939. [139]

Judgment Roll No. 3291, Circuit Court State of Oregon for Harney County.

C. H. Leonard vs. Samuel R. Bennett.

All instruments—Creditors Exhibit A

Complaint—Debtor's Exhibit #7

Motion for Default Judgment—Debtor's Exhibit #8

DEBTOR'S EXHIBIT #7

COMPLAINT

#3291

Comes now the Plaintiff and for cause of suit against the above named defendants, and each and all of them, alleges:—

1

That the defendants Samuel R. Bennett, sometimes written S. R. Bennett, and Alice Bennett were at all the times in this complaint herein mentioned, and now are husband and wife. That they are the same identical individuals and persons mentioned herein respectively as President and Secretary of the Bennett Realty Company a Corporation, organized under the laws of the State of Oregon.

2

That on the 28th day of April, 1925, the said defendants Samuel R. Bennett and Alice Bennett, his wife, were the owners in fee and in the possession of the following described real property, to wot:

The E½ of the SW¼ of Sec. (8), in T. 23, S.R. (31), E.W.M., in Harney County, Oregon, containing (80) acres, together with all water and

water rights appurtenant thereto, and together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

3

That at Burns, Oregon, on said 28th day of April, 1925, the said defendants Samuel R. Bennett and Alice Bennett his wife, for value received, made executed and delivered to one Homer B. Mace, their certain pro*p*issory note in writing, of which the following is a true and correct copy, to wit:—

$3000.00 Burns, Oregon, April 28, 1925.

On or before Three years after date, without grace, I promise to pay to the order of Homer B. Mace, Three Thousand Dollars, for value received, with interest after date at the rate of eight per cent per annum until paid. Interest to be paid annually and if not so paid the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. Principal and interest payable in United States Gold Coin at Burns, Oregon, and in case of suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

S*ALUEL* R. BENNETT,
ALICE BENNETT.

4

That at Burns, Oregon, on said 28th day of April, 1925, said defendants Samuel R. Bennett and Alice Bennett his wife, made executed and delivered to said Homer B. Mace, in order to secure the payment of said promissory note in accordance with the terms and conditions thereof their certain mortgage in writing, under their hands and seals, covering and upon the real property therein and hereinbefore described, [140] a true copy of which said mortgage together with the endorsements thereon is hereunto attached, marked Exhibit "A" and made a part of this complaint.

5

That said mortgage was executed, witnessed, attested, certified and acknowledged, so as to entitle the same to be recorded, and the same was afterwards to wit, on the 30th day of April, 1925, duly recorded in the office of the County Clerk of Harney County, Oregon, in Book "J" at page 539 thereof, records of mortgages for said County.

6

That thereafter, to wit, on the 29th day of May, 1925, the said Homer B. Mace, for value, duly and regularly granted, bargained, sold, assigned, transferred and set over unto C. H. Leonard the plaintiff herein said indenture of mortgage above described, together with the note and obligation therein described, and plaintiff is now the owner and holder of said note and mortgage.

7

That there is now due owing and unpaid on said note from said Samuel R. Bennett and Alice Bennett his wife, in principal and interest the sum of $1987.30 with accruing *int* on $1563.95 from Jan. 1st, 1938; said sum of $1563.95 being the balance due on August 13th, 1934, when the last payment thereon was made.

8

That the mortgage hereinabove described still remains unsatisfied of record or otherwise, and is a first lien upon said real property therein described, except as to tracts 2, 3, 4, and 5, of 5 acres each, that have been released therefrom, leaving remaining 11 tracts of 5 acres each, to wit, tracts 1, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 on which the lien of said mortgage is and remains in full force and effect.

9

That no action at law or suit in equity has heretofore been commenced or had or is now pending for the collection of said note or the foreclosure of said mortgage; that the plaintiff has no plain speed or adequate remedy at law.

10

That $200.00 is a reasonable sum to be allowed by the Court as plaintiff's attorney's fees on this note and mortgage for the institution of suit thereon.

Plaintiff further alleges:—

11

Plaintiff restates paragraph 1 in this complaint.

12

That on the 6th day of Nov., 1930, the said defendants Samuel R. Bennett and Alice Bennett his wife, were the owners in fee and in the possession of the following described real and personal property, to wit:

All of Lots 4 and 5 of Sec. (17), and the E½ of the NE¼ of Sec. (18), in T. (23), S. R. (31), E. W. M.;

Also the SE¼ of Sec. (31), in T. (19), S.R. (31), E. W. M., and Lots 3, 4, and 5 and the SE¼ of the NW¼ of Sec. (6), in T. (20), S. R. (31), E. W. M.;

Also all of Block (51) in the Second addition to the City of Burns, Oregon; [141]

Also the E½ of the SW¼ and Lots 3 and 4 Sec. (30) in T. (23), S.R. (31), E.W.M., all of said property being in the

County of Harney and State of Oregon, together with the tenements hereditaments and appurtenances, thereunto belonging or in anywise appertaining, including any and all water rights, of every kind and description, however evidence, which are now or hereafter may be appurtenant to said premises, or any part thereof, and also any and all credits due or to become due to the mortgagors as a part of and growing out of the mortgages on the above described premises and property, to the Federal Land Bank of Spokane, Washington, and also any

and all of the rents issues and profits and crops arising out of and coming from said premises.

13

That at Burns, Oregon, on November 6th, 1930, the said defendants Samuel R. Bennett (as S. R. Bennett) and Alice Bennett his wife, for value received, made executed and delivered to C. H. Leonard and Fred Haines their certain promissory notes in writing of which the following are true and correct copies, to wit:—

$1500.00 Burns, Oregon, Nov. 6, 1930

One year after date without grace, we promise to pay to the order of C. H. Leonard at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America, of the present standard value, with interest thereon in like lawful money at the rate of 8 per cent per annum from date until paid, for value received. Interest to be paid semiannually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum in like lawful money as the Court may adjudge reasonable as attorney's fees to be allowed in said suit or action.

S. R. BENNETT,
ALICE BENNETT.

$1500.00 Burns, Oregon, Nov. 6th, 1930

One year after date without grace, we promise to pay to the order of Fred Haines at Burns, Oregon, One Thousand Five Hundred Dollars in lawful money of the United States of America, of the present standard value with interest thereon in like lawful money at the rate of 8 per cent per annum, from date until paid for value received. Interest to be paid semiannually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum in like lawful money, as the Court may adjudge reasonable as attorney's fees to be allowed in said suit or action.

S. R. BENNETT,
ALICE BENNETT.

14

That at Burns, Oregon, on Nov. 6th, 1930, the said defendants Samuel R. Bennett (as S. R. Bennett), and Alice Bennett his wife, made executed and delivered to C. H. Leonard and Fred Haines, in order to secure the payment of said promissory notes in accordance with the terms and conditions thereof, their certain mortgage in writing, under their hands and seals covering and upon the real

and personal property therein and hereinbefore described, a true copy of which said mortgage together with the endorsements thereon is hereto attached, marked Exhibit "B" [142] and made a part of this complaint.

15

That said mortgage was executed, witnessed, attested, certified and acknowledged, so as to entitle the same to be recorded, and the same was afterwards, to wit, on the 26th day of Nov., 1930, duly recorded in the office of the County Clerk of Harney County, Oregon, in Book "M", at page 219 thereof, records of mortgages for said County, and ever since said date has been and now is so of record.

16

That no part of said promissory notes has been paid except the interest due thereon for the first year, and there is now due and owing on said notes from said Samuel R. Bennett and Alice Bennett his wife, in principal and interest the sum of $4476.67, with accruing interest on the principal from Jan. 1st, 1938.

17

That the mortgage hereinabove described still remains unsatisfied of record or otherwise, and is a first lien upon said real and personal property therein described, save and except the liens expressed in the mortgages to the Federal Land Bank of Spokane, Washington, mentioned in said mortgages, and on which at this time there are unma-

tured balances of $3286.53 and $5625.19, with some accruing interest.

18

That the interest of the said Fred Haines herein has been assigned and transferred to the plaintiff for the purpose of this foreclosure and to simplify the same, and the plaintiff therefore is now the owner and holder of said note; that same have not been paid or any part thereof, except as hereinabove alleged in paragraph 16; that there is now due and owing and unpaid thereon from said defendants Samuel R. Bennett and Alice Bennett his wife, in principal and interest, to the plaintiff the sum of $4476.67, with accruing interest on principal from Jan. 1, 1938.

19

That no action at law or suit in equity has heretofore been commenced or had or is now pending for the collection of said notes or the foreclosure of this mortgage; that the plaintiff has no plain speedy or adequate remedy at law.

20

That $450.00 is a reasonable sum for the Court to allow the plaintiff as attorney's fees herein for the institution of this suit.

Plaintiff further alleges:—

21

Plaintiff restates paragraph 1 in this complaint.

22

That on the 18th day of Feb., 1931, the said defendants Samuel R. Bennett and Alice Bennett his wife, were the owners in fee and in possession of the following described real and personal property, to wit:—

(1) All of Lots 4 and 5 of Sec. (17), and the E½ of the NE¼ of Sec. (18), in T. (23), S. R. (31), E. W. M.;

(2) Also, the SE¼ of Sec. (31), in T. (19), S.R. (31), E. W. M., and Lots 3, 4 and 5 and SE¼ NW¼ of Sec. (6), in T. (20), S. R. (31) E. W. M.;

(3) Also, all of Block (51), in the Second Addition to the City of Burns, Oregon;

(4) Also, the E½ of the SW¼, and Lots 3 and 4 in Sec. (30), in T. (23), S. R. (31), E. W. M.;

(5) Also, the E½ of the SW¼ of Sec. (8), in T. (23), S. R. (31), E. W. M., (save and excepting therefrom Tracts 2, 3, 4 and 5 consisting of five acres each, contained in said above described land)

all of said above described lands and property being in the County of [143] Harney and state of Oregon; together with any and all tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including any and all water rights of every kind and description however evidenced, which are now or hereafter may be appur-

tenant to said premises or any part thereof, and any and all dams ditches and other appliances connected with or pertaining to in any way the irrigation of said lands, or interests therein and rights thereto, and also any and all credits due or to become due to the mortgagors as a part and growing out of the mortgages on the above described premises and property to the Federal Land Bank of Spokane, Washington, and also any and all of the rents issues and profits and crops arising out of and coming from said premises or any part thereof.

23

That at Burns, Oregon, on Feb. 18th, 1931, the said defendants Samuel R. Bennett (as S. R. Bennett), and Alice Bennett his wife, for value received, made executed and delivered to C. H. Leonard and Fred Haines, their certain promissory notes in writing, of which the following are true and correct copies, to wit:—

> $1500.00 Burns, Oregon, Nov. 6th, 1930.
> On Demand after date, without grace, we promise to pay to the order of C. H. Leonard, at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America, of the present standard value, with interest thereon in like lawful money at the rate of 8 per cent per annum, from date until paid for value received. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay in addi-

tion to the costs and disbursements provided by statute, such additional sum in like lawful money as the Court may adjudge reasonable as attorney's fees to be allowed in said suit or action.

S. R. BENNETT,
ALICE BENNETT.

$1500.00 Burns, Ore., Feb. 18th, 1931

On Demand after date, without grace we promise to pay to the order of C. H. Leonard and Fred Haines at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America, of the present standard value, with interest thereon in like lawful money at the rate of 8 per cent per annum, from date until paid, for value received. And in case suit or action is instituted to collect this note or any portion thereof, we promise and agree to pay in addition to the costs and disbursements, provided by statute such additional sum in like lawful money as the Court may adjudge reasonable as attorney's fees to be allowed in said suit *of* action.

S. R. BENNETT,
ALICE BENNETT.

24

That at Burns, Oregon, on Feb. 18th, 1931, the said defendants Samuel R. Bennett (as S. R. Bennett), and Alice Bennett his wife, made executed

and delivered to C. H. Leonard and Fred Haines, in order to secure payments of said promissory notes in accordance with the terms and conditions thereof, their certain mortgage in writing, under their hands and seals covering upon the real and personal property therein and *and* hereinbefore described, a true copy of which said mortgage together with the endorsements thereon, is hereto attached marked Exhibit "C" and made a part of this complaint.

25

That said mortgage was executed, witnessed, attested, certified and acknowledged, so as to entitle the same to be recorded, and the same was afterwards, to wit, on the 20th day of Feb. 1931, duly recorded in the office of the County Clerk of Harney County, Oregon, and ever since said date has been and now is so of record.

26

That no part of said promissory note in favor of the plaintiff C. H. Leonard has ever been paid, and there is now due owing and unpaid thereon in principal and interest from the said Samuel R. Bennett and Alice Bennett his wife to the plaintiff the sum of $2358.37, [144] with accruing interest on the principal sum from Jan. 1st, 1938. That the note in favor of C. H. Leonard and Fred Haines was given to cover any advances that might be necessary from time to time, as provided for in said mortgage, for the payment of taxes on the properties as well as

installments due to the Federal Land Bank; that the said Fred Haines has no interest whatever in said note or in this mortgage; that there is due owing and unpaid on this note from the said defendants Samuel R. Bennett and Alice Bennett his wife, to the plaintiff for advancements made at this time the sum of $158.83, with accruing interest from Jan. 1st, 1938.

27

That the plaintiff is now the owner and holder of both of said notes; that the same have not been paid or any part thereof; that there is due owing and unpaid on the same from the defendants Samuel R. Bennett and Alice Bennett his wife, principal and interest in the sum of $2517.20, with accruing interest on the principal from Jan. 1st, 1938.

28

That the said mortgage herein described still remains unsatisfied *or* record or otherwise; that it is a valid and subsisting lien on all of the property therein described, subject only to the prior rights and liens of the Federal Land Bank, as well as the prior liens of the plaintiff on the Mace Mortgage as in this complaint set forth and made clear.

29

That no action at law or suit in equity has heretofore been commenced or had, or is now pending for the collection of said notes or the foreclosure of this mortgage; that the plaintiff has no plain speedy or adequate remedy at law.

30

That $250.00 is a reasonable sum to be allowed by the Court as Plaintiff's attorney's fees herein in the institution of this suit.

31

That at this time there are delinquent taxes due to Harney County on said mortgaged property in the sum of $459.12, which should be included in the judgment and decree made herein in favor of plaintiff.

32

That there is at this time as a part of said mortgaged property, about 158 tons of hay in the stack of the year 1937, on the lands in Sec. (30), T. (23), S. R. 31, E. W. M., that has not as yet been disposed of, and if not disposed of later, must be included in the judgment and decree entered herein.

33

That the plaintiff has been in the open, notorious, exclusive peaceful and sole possession control and management of said mortgaged property and all thereof, as was intended and provided for from the date of the execution and delivery of the two mortgages last mentioned herein and is now in such open, notorious, exclusive peaceful and sole possession and control and management of said mortgaged property and all thereof; that the rents issues and profits arising from and growing out of said properties have from time to time as received by the

plaintiff been applied to the payment of taxes, installments due to the Federal Land Bank insurance, interest, and necessary in labor and otherwise, in connection with the management and control and protection thereof, and have from time to time been fully accounted for between the parties hereto.

34

That in the month of Sept., 1931, the said defendants Samuel R. Bennett and Alice Bennett his wife, formed the corporation mentioned herein as the Bennett Realty Company, and then and there transferred by warranty deed of conveyance to said Bennett Realty Company a corporation [145] among other lands, all of the lands described in these mortgages herein being foreclosed, with the exception of Block 51, and Lots 3, 4, and 5 and the SE¼ NW¼ of Sec. (6), in T. (20) S. R. (31), E. W. M.

35

That said corporation and the property thereof and belonging thereto, has been at all times since said incorporation and now is owned by the said Samuel R. Bennett and Alice Bennett his wife, subject however to the liens incumbrances and mortgages herein described and existing against said lands.

36

That in and by the terms and conditions contained in and forming a part of the two last mentioned mortgages, it is specifically and particularly

covenanted and agreed by the said Samuel R. Bennett and Alice Bennett his wife, mortgors herein, that the terms conditions and requirements contained in each of the two Federal Land Bank Mortgages, hereinabove described "shall each and all apply to this mortgage so far as applicable, and are made a part hereof by reference, to the same force and effect as if incorporated herein in full".

37

That each of the said Federal Land Bank mortgages provides among other things, that "the mortgagees shall have the right to the appointment of a receiver to collect the rents issues and profits of the mortgaged premises".

Wherefore Plaintiff prays for judgment and decree of the Court as follows:

(1) Judgment against said defendants Samuel R. Bennett and Alice Bennett his wife, for the total sum of $9440.29, as herein set out, with accruing interest on the principal involved at 8 per cent per annum from Jan. 1st, 1938, and for the further sum of $900.00 as attorney's fees, together with the costs and disbursements of this suit.

(2) That the plaintiff's said mortgages be decreed to be valid and subsisting and prior liens upon all of the real and personal property therein and hereinbefore described, save and except as to the Federal Land Bank mortgages, as hereinabove stated, and that said lien is prior in time and superior to any lien claim or interest that the defendants or either or any of them, may have or claim to have,

in or to said premises and property by virtue of any claim of whatsoever kind or nature.

(3) That said defendants and each and all of them, and any and all persons or interests claiming by, thru or under them, or either or any of them, subsequent to the execution of plaintiff's said mortgages, be forever barred and foreclosed of any and all rights, claims, or equity of redemption in and to said premises and property and every part thereof.

(4) That the usual decree may be made for the foreclosure of the plaintiff's said mortgages, and the sale of said premises and property, both real and personal, by the sheriff of Harney County, Oregon, according to the law and the practice of this court.

(5) That the proceeds of the sale of said mortgaged property be applied as follows: First, to the payment of the costs and expenses of said sale, and the costs and disbursements of this suit, including the plaintiff's attorney's fees; Second, to the payment of the judgment recovered by the plaintiff against the defendants or any thereof in this suit; the balance, if any there be, to be disposed of as the Court may direct.

(6) That if after such sale and the application of the proceeds thereof, it shall be ascertained that such proceeds are insufficient to pay the judgment which may be recovered against said defendants Samuel R. Bennett and Alice Bennett his wife, plaintiff may have judgment over against the said defendants Samuel R. Bennett and Alice Bennett

his wife, [146] in the amount of any such deficiency, and may have execution thereon.

(7) That the plaintiff may become a purchaser at said sale; that said sheriff execute a certificate of sale to the purchaser; and that upon the expiration of the statutory period of redemption a sheriff's deed to said premises and all thereof be duly issued to the party entitled to the same; that the purchaser at said sale be let into immediate possession of said premises. And in case the plaintiff should become the purchaser at said sale, then, that he be permitted to offset his judgment herein, or such part thereof, as may be equal to the amount of his bid, and against such bid to the extent thereof.

(8) That the plaintiff continue in the sole and exclusive possession operation and control and management of said mortgaged premises and property as he has in the past, and account for the proceeds from the same accordingly.

(9) That plaintiff may have such other further and different relief in the premises as to the court shall seem equitable and just or as the nature of the cause may require.

C. H. LEONARD,
J. S. COOK,
Attorneys for plaintiff. [147]

EXHIBIT "A"

This Indenture, Made this 28th day of April, A. D. 1925, between Samuel R. Bennett and Alice Bennett his wife, of the County of Harney, State

of Oregon, parties of the first part, and Homer B. Mace of the County of Harney State of Oregon, party of the second part, Witnesseth, That the said parties of the first part, for and in consideration of the sum of Three Thousand Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell and convey unto the said party of the second part, his heir and assigns forever, all the following bounded and described property to-wit: The east one-half of the southwest quarter of section eight (8) in township twenty-three (23) south of range thirty-one (31), east of Willamette Meridian, Harney County, Oregon, containing eighty (80) acres together with all water and water rights appurtenant thereto. (It is hereby understood and agreed by and between the parties hereto, and the same is hereby made a part of the terms, conditions, covenants, and agreements of this mortgage, that the said parties of the first part herein shall have the right and privilege, at any time during the existence of this mortgage, upon demand therefor, to have released from the lien and operation of such mortgage any portion of not less than five (5) acres of the premises covered thereby, upon payment to the party of the second part of the sum of seventy-five dollars ($75.00) per acre for the land so to be released, and upon the payment of such an amount per acre, the said party of the second part, shall and he hereby agrees to immediately release and discharge from the lien and operation

of this mortgage the number of acres demanded and the portion of said premises designated by the said parties of the first part, and any and all such amounts so paid shall be duly credited upon the promissory note secured hereby) Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining; and also the estate, right, title and interest of the said parties of the first part, of in and to the same. To have and to hold, the hereinbefore granted, bargained and described premises with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the parties of the first part covenant that they are the owner in fee of said premises, that they will warrant and defend them against the lawful claims and demands of all persons whomsoever. This conveyance is intended as a mortgage, to secure the payment of the sum of Three Thousand Dollars, in accordance with the tenor of one certain promissory note of which the following is a substantial copy, to wit:

$3000.00 Burns, Oregon, April 28th, 1925

On or before Two Years, after date, without grace, I promise to pay to the order of Homer B. Mace, Three Thousand Dollars, for value received, with interest after date at the rate of eight per cent per annum until paid. Interest to be paid annually and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the

option of the holder of this note. Principal and interest payable in United States Gold Coin at Burns, Oregon, and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SAMUEL R. BENNETT,
ALICE BENNETT.

Now, therefore, if the said promissory note, principal and interest, shall be paid at maturity, according to the terms thereof, this indenture shall be void, but in case default shall be made in the payment or interest as above provided, then the whole sum both the principal and interest accrued at the time default is made, shall become due and payable, and the party of the second part, his executors, administrators and assigns are hereby empowered to foreclose this mortgage in the manner prescribed by law. And the said Samuel R. Bennett and Alice Bennett his wife, their heirs, executors and administrators do covenant and agree to pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money as above mentioned.

In witness whereof, we have hereunto set our hands and seals the day and year first above written.

[Seal] SAMUEL R. BENNETT,
[Seal] ALICE BENNETT.

Signed Sealed and Delivered in the Presence of us as Witnesses:

A. C. WELCOME,
ALBERT A. TRAUGOTT. [148]

State of Oregon,
County of Harney—ss.

This certifies that on this 29th day of April, 1925, before me the undersigned and Notary Public in and for said County and State, personally appeared the within named Samuel R. Bennett and Alice Bennett his wife, known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal of Notary] ALBERT A. TRAUGOTT,
Notary Public for Oregon.

My Commission Expires June 16, 1925.

[Endorsed]: State of Oregon, County of Harney—ss. I certify that the within instrument of writing was received for record on the 30th day of April, 1925, at 10 o'clock A. M., and recorded on page 539 in Book "J" Record of Mortgages of said County. Chas. E. Dillman, Clerk. By Wm. M. Carroll, Deputy. [149]

EXHIBIT "B"

This indenture witnesseth, That S. R. Bennett and Alice Bennett his wife the parties of the first part, for and in consideration of the sum of Three Thousand Dollars to them in hand paid by C. H. Leonard and Fred Haines, the parties of the second part, the receipt whereof is hereby acknowledged, have bargained sold and conveyed and by these presents do bargain, sell, convey and confirm unto the parties of the second part the following described premises and property, to-wit:

All of Lots Four and Five of Section Seventeen, and the East Half of the Northeast Quarter of Section Eighteen, in Township Twenty-three south, Range Thirty-one East of Willamette Meridian; also the SE¼ of Sec. 31, in Township 19, S. R. 31, E. W. M., and Lots 3, 4 and 5 and the SE¼ of the NW¼ of Sec. 6, in Township 20, S. R. 31, E. W. M. also all of Block 51 in the Second addition to the City of Burns, Oregon; also the East Half of the Southwest Quarter and Lots Three and Four in Section Thirty, in Township Twenty-three south, Range Thirty-one East of Willamette Meridian, and all in the County of Harney and State of Oregon, together with tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including any and all water rights of every kind and description, however evidenced, which are now, or hereafter may be appurtenant to said premises or any part thereof, and also, any

and all credits due to or to become due to the mortgagors as a part of and growing out of the mortgages on the above described premises and property to the Federal Land Bank of Spokane, Washington, and also any and all of the rents issues and profits and crops arising out of and coming from said premises. It being understood and agreed that the stock belonging to the mortgagors herein in the National Farm Loan Association in connection with the loans above described, as well as the rents issues profits and crops arising out of or grown on the above described premises, constitute a part of the mortgaged property herein described.

The mortgagors herein covenant and agree and guarantee to and with the mortgagees herein that all of the hereinabove described premises and property are entirely free from any and all incumbrances save and except there is a first mortgage to the Federal Land Bank of Spokane, Washington, on the 160 acres above described in Sec. 30, T. 23, S. R. 31 on which there is now unpaid the sum of $3784.96, and a mortgage on all of the other property and premises above described, to the said Federal Land Bank of Spokane, Washington, on which there is now an unpaid principal of $6308.26.

The mortgagors herein covenant and agree that the terms conditions and requirements in said mortgages to the Federal Land Bank above mentioned, and each of them, shall each and all apply to this mortgage so far as applicable, and are made a part hereof, by reference, to the same force and effect

as if incorporated herein in full, and that they will pay all taxes and assessments that now are or may hereafter be levied or assessed against said property or any part thereof, at the time the same becomes due and payable and before the same becomes delinquent, during the life of this mortgage, and that they will well and truly pay all installments and assessments, interest payments, and payments on principal, provided and made a part of these prior mortgages, as well as in this mortgage, when the same shall become due and payable, and not allow the same or any part thereof, to become delinquent, and shall keep fully paid up at all times and fully performed each and every one of the obligations and covenants in said mortgages and in this mortgage expressed, on their part to be performed, and any default by the mortgagors herein in the payment of said obligations, or any one or part thereof, as above stated, shall be considered and be as a covenant in this mortgage broken and shall at once render this mortgage and the amount due thereunder immediately due and payable, and this mortgage shall be subject to immediate foreclosure. It is further understood and agreed by and between the parties hereto, that the mortgagors herein are to keep the dwelling house located on Block 51 in Burns, insured in the sum of $3500.00 in one or more responsible fire insurance companies designated by the mortgagees herein, against loss by fire, $2000.00 of same in case of loss to be paid to the Federal Land Bank, on its first mortgage, and

$1500.00 of the same in case of loss to be paid to the mortgagees herein as their interests may appear. [150]

It is further understood and agreed by and between the parties hereto, that in case the mortgagors herein fail neglect or refuse for any reason to pay any installment provided for in said mortgages, or to pay the taxes on said property, when the same shall become due and payable, and before the same becomes delinquent, or to provide for the insurance mentioned herein, and to pay the premium therefore, the said mortgagees herein may at their option make any or all of such payments to protect their own interests, and secure the insurance policies mentioned herein, and in that event the sums so paid shall become a part of the amount due under this mortgage, shall be secured by the property herein described, shall become immediately, due and payable to them from the mortgagors, and shall draw interest from the date of such payment at the rate of 8 per cent per annum. But such action on their part if taken, shall in nowise be construed as a waiver on the part of the mortgagees herein for a strict compliance on the part of the mortgagors with each and every condition contained and provided in this mortgage, as well as in the first mortgages, and that a failure on the part of the mortgagors to meet these requirements and each and all of them, shall render this mortgage subject to immediate foreclosure, at the option of the mortgagees herein at any time after condition, broken.

Now, if the sums of money due on all the instruments herein described shall be paid according to agreement expressed in said mortgages, and each and every covenant and agreement in said instruments contained, shall be fully kept and performed, at the time and in the manner expressed therein, including this mortgage, then this conveyance shall be void. But in case default shall be made in the payment of any sum of money provided for in either or any of the instruments mentioned, including this mortgage, when the same shall become due and payable, under the terms and conditions set out in each separate instrument, including any and all assessments, taxes, installments, interest, principal, and premiums for insurance herein mentioned, and pay for the same, then the covenants in this mortgage shall be considered broken and the whole amount of money both principal and interest under this mortgage shall at once become due and payable, and the said mortgagees and their legal representatives may sell and *and* all of the premises and property in this mortgage described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale or sales, retain the said principal and interest and any other sum that may be due to the mortgagees from the mortgagors, or either of them, and covered and secured by this mortgage, together with costs and charges of making such sale or sales, and a reasonable sum as at-

torney's fees, and the overplus if any there be, pay over to the said mortgagors, their heir or assigns.

The mortgagees herein reserve the right to collect the rents issues and profits coming from said property herein described and to apply the same on this mortgage.

This mortgage is intended as a conveyance only to secure the payment of the sum of Three Thousand Dollars in accordance with the terms and conditions of two certain promissory notes in writing of which the following are true copies, to wit.

> $1500.00 Burns, Oregon, Nov. 6th, 1930.
>
> One Year after date, without grace, we promise to pay to the order of C. H. Leonard, at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America, of the present standard value with Interest thereon in like lawful money at the rate of 8 per cent per annum from date until paid, for value received. Interest to be paid semiannually and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute such additional sum in like lawful money as the Court may adjudge reasonable as attorney's fees to be allowed in said suit or action.
>
> S. R. BENNETT,
> ALICE BENNETT. [151]

$1500.00 Burns, Oregon, Nov. 6th, 1930

One Year after date, without grace, we promise to pay to the order of Fred Haines at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America, of the present standard value with interest thereon in like lawful money at the rate of 8 per cent per annum from date until paid for value received. Interest to be paid semiannually, and if not so paid the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute such additional sum in like lawful money as the Court may adjudge reasonable as Attorney's fees in said suit or action.

S. R. BENNETT,
ALICE BENNETT.

Witness our hands and seals this 6th day of November, 1930, at Burns, Oregon.

[Seal] S. R. BENNETT,
[Seal] ALICE BENNETT.

Done in presence of:
G. N. JAMESON,
HELEN McGEE.

State of Oregon,
County of Harney—ss.

Be it remembered that on this 6th day of November, 1930, before me the undersigned, a Notary Public in and for said County and State there personally appeared the within named S. R. Bennett and Alice Bennett his wife, who are personally known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and Notarial seal the day and year last above written.

[Seal of Notary] G. N. JAMESON,
Notary Public for Oregon.

My commission expires May 4th, 1934.

[Endorsed]: State of Oregon, County of Harney—ss. I certify that the within instrument of writing was received for record on the 26th day of November A. D. 1930, at 2 o'clock P. M. and recorded in Book "M" at page 219 of Mortgage Records of said County. Wm. M. Carroll, Clerk, by Walter R. Powell, Deputy. [152]

EXHIBIT "C"

This indenture witnesseth: That S. R. Bennett and Alice Bennett his wife, the parties of the first

part, for and in consideration of the sum of Three Thousand Dollars, to them in hand paid by C. H. Leonard and Fred Haines, the parties of the second part, the receipt whereof is hereby acknowledged, have bargained, sold and conveyed, and by these presents do bargain sell and convey and confirm unto the parties of the second part, the following described premises and property, to-wit:

(1) All of Lots Four and Five of Section Seventeen and the East Half of the Northeast Quarter of Section Eighteen, in Township Twenty-three south Range Thirty-one east of Willamette Meridian;

(2) Also the SE¼ of Sec. 31, in T. 19, S. R. 31, E. W. M., and Lots 3, 4 and 5 and the SE¼ of the NW¼ of Sec. 6, in T. 20, S. R. 31, E. W. M.;

(3) Also all of Block 51 in the second addition to the City of Burns, Oregon;

(4) Also the East Half of the Southwest Quarter and Lots Three and Four in Section Thirty, in Township Twenty-three, south, Range Thirty-one east of Willamette Meridian.

(5) Also the East Half of the Southwest Quarter of Section Eight in Township Twenty-three south, Range Thirty-one east of Willamette Meridian, (save and excepting therefrom Tracts Two, Three, Four and Five consisting of five acres each contained in said above described lands) and all of said above described lands being in the County of Harney and State of Oregon; together with any and all tenements hereditaments and appurtenances

thereunto belonging or in anywise appertaining, including any and all water rights of every kind and description however evidenced, which are now or hereafter may be appurtenant to said premises, or any part thereof, and any and all dams ditches and other appliances connected with or pertaining to in any way the irrigation of said lands, or interests therein and rights thereto, and also any and all credits due or to become due to the mortgagors as a part of and growing out of the mortgages on the above described premises and property to the Federal Land Bank of Spokane, Washington, and also any and all of the rents issues profits and crops arising out of and coming from said premises or any part thereof. The same to be turned over and delivered to the mortgagees herein to apply on this mortgage. It being further understood and agreed that the stock belonging to the mortgagors herein in the National Farm Loan Association connected with the loans herein described, as well as the rents issues profits and crops arising out of or grown on the above described premises, constitute a part of the mortgaged property herein described.

The mortgagors herein covenant and agree to and with the mortgagees herein that all of the hereinabove described premises and property are entirely free from any and all incumbrances, save and except there is a first mortgage to the Federal Land Bank of Spokane, Washington, on the 160 acres above described in Sec. 30, T. 23, S. R. 31, on which

there is now unpaid the sum of $3784.96, with installment due thereon of $136.50 semiannually, on March 1st and September 1st in each year until paid; and a mortgage on all of the property described in paragraphs (1), (2), and (3), above, to the Federal Land Bank of Spokane, Washington, on which there is now an unpaid principal of $6308.26, with installments of $227.50, May 28 and Nov. 28, yearly.

The mortgagors further covenant and agree and guarantee that there is a first mortgage on the property described in paragraph (5) herein, on which there is due to C. H. Leonard the sum of $2212.41, with interest from Nov. 6, 1930, as provided in the note and mortgage. And further that there is a second mortgage to C. H. Leonard and Fred Haines on the property described in paragraphs (1), (2), (3) and (4), for the sum of $3000 under date of November 6, 1930, due one year from said date, as provided in said mortgage.

The mortgagors herein covenant and agree that the terms conditions and requirements in said mortgages hereinabove described and each of them, shall each and all apply to this mortgage so far as applicable, and are made a part hereof by reference, to the same force and effect as if incorporated herein in full, and that they will pay all taxes and assessments that now [153] or may hereafter be levied or become due against said property or any part thereof, at the time the same becomes due and payable, and before the same becomes delinquent, dur-

ing the life of this mortgage, and that they will well and truly pay all installments and assessments, interest payments and payments on principal, provided and made a part of these mortgages, when the same shall become due and payable, and not allow the same or any part thereof to become delinquent, and shall keep fully paid up at all times and fully performed each and every one of the obligations and covenants in said mortgages, and in this mortgage expressed, on their part to be performed, and any default by the mortgagors herein in payment of said obligations, or any one or part thereof, as above stated, shall be considered and be as a covenant in this mortgage broken, and shall at once render this mortgage and the amount due thereunder immediately due and payable, and this mortgage shall be subject to immediate foreclosure.

It is further understood and agreed by and between the parties hereto that the mortgagors herein are to keep the dwelling house located on Block 51 in Burns, insured in the sum of $3500.00 in one or more responsible fire insurance companies designated by the mortgagors herein, against loss by fire, $2000.00 of the same in case of loss to be paid to the Federal Land Bank of Spokane, Washington, on its first mortgage, and $1500.00 of the same in case of loss to be paid to the mortgagors herein as their interests may appear.

It is further understood and agreed by and between the parties hereto, that in case the mortgagors herein fail neglect or refuse for any reason to pay

any installment provided for in said mortgages, or to pay the taxes on said property when the same becomes due and payable, and before the same becomes delinquent, or to provide for the insurance mentioned herein, and to pay the premium therefor, the said mortgagees herein may at their option make any or all of such payments to protect their own interests, and secure the insurance policies mentioned herein, and in that event the sum so paid shall become a part of the amount due under this mortgage, shall be secured by the property herein described, shall become immediately due and payable to them from the mortgagors, and shall draw interest from the date of such payment at the rate of 8 per cent per annum until paid. But such action on the part of the mortgagees, if taken, shall in no wise be construed as a waiver on the part of the mortgagees herein for a strict compliance on the part of the mortgagors with each and every condition contained and provided in this mortgage, as well as in the other mortgages mentioned herein, and that a failure on the part of the mortgagors to meet these requirements and each and all of them, shall render this mortgage subject to immediate foreclosure, at the option of the mortgagees herein, at any time after conditions broken. Now if the sums of money due on all the instruments herein described shall be well and truly paid according to agreement expressed in said mortgages, and each and every covenant and agreement in said instruments contained shall be fully kept and performed

at the time and in the manner expressed therein, including this mortgage, then this conveyance shall be void. But in case default shall be made in the payment of any sum of money provided for in either or any of the instruments mentioned, including this mortgage, when the same shall become due and payable under the terms and conditions set out in each separate instrument, including any and all assessments, taxes, installments, interest, principal, and premiums for insurance, or shall fail or neglect or refuse to secure and provide the insurance herein mentioned, and pay for the same, then the covenants in this mortgage shall be considered broken, and the whole amount of money, both principal and interest under this mortgage shall at once become due and payable, and the said mortgagees and their legal representatives may sell any and all of the premises and property in this mortgage described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale or sales, retain the said principal and interest and any other sum that may be due to the mortgagees from the mortgagors herein, or either of them, and covered and secured by this mortgage, together with costs and charges of making such sale or sales, and a reasonable sum as attorneys fees and the overplus if any there be, pay over to the mortgagors, their heirs or assigns.

The mortgagees herein reserve the right to collect the rents issues and profits coming from said prop-

erty herein described, or any part thereof, and to apply the same on this mortgage. And any rents collected by the mortgagors herein are to be turned over to the mortgagees herein to be so applied. [154] This mortgage is intended as a conveyance only to secure the payment of the sum of $3000.00, in accordance with the terms of two certain promissory notes in writing, of which the following are true copies, to wit:

$1500.00 Burns, Oregon, Nov. 6, 1930

On Demand after date without grace, we promise to pay to the order of C. H. Leonard at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America of the present standard value with interest thereon in like lawful money at the rate of 8 per cent per annum from date until paid for value received. And in case suit or action is instituted to collect this note or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute such additional sum in like lawful money as the Court may adjudge reasonable as attorneys fees to be allowed in said suit or action.

S. R. BENNETT,
ALICE BENNETT.

$1500.00 Burns, Oregon, Feb. 18, 1931

On Demand after date without grace, we proise to pay to the order of C. H. Leonard and Fred Haines at Burns, Oregon, One Thousand Five Hundred Dollars, in lawful money of the United States of America of the present standard value, with interest thereon in like lawful money at the rate of 8 per cent per annum from date until paid for value received. And in case suit or action is instituted to collect this note or any portion thereof we promise and agree to pay in addition to the costs and disbursements provided by statute such additional sum in like lawful money as the Court may adjudge reasonable as attorney's fees to be allowed in said suit or action.

S. R. BENNETT,
ALICE BENNETT.

Witness our hands and seals this 18th day of February, 1931, at Burns, Oregon.

[Seal] S. R. BENNETT,
[Seal] ALICE BENNETT.

Done in presence of:
A. A. BARDWELL,
RUTH MILLER.

State of Oregon,
County of Harney—ss.

Be it remembered, that on this 18th day of February, 1931, before me the undersigned a Notary

Public in and for said County and State there personally appeared the within named S. R. Bennett and Alice Bennett his wife who are personally known to me to be the persons described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony whereof, I have hereunto set my hand and notarial seal the day and year last above written.

[Seal of Notary] A. A. BARDWELL,
Notary Public for Oregon.

My commission expires 8/18/33.

[Endorsed]: State of Oregon, County of Harney—ss. I certify that the within instrument of writing was received for record on the 20th day of Feb. A. D. 1931, at 2 o'clock P. M. and recorded in Book "M" at page 256 of Mortgage Records of said County. Wm. M. Carroll, Clerk, By Walter R. Powell, Deputy. [155]

State of Oregon,
County of Harney—ss.

I, C. H. Leonard being first duly sworn, say that I am the plaintiff in the within entitled suit, that I have read the foregoing complaint and know the contents thereof, and the same is true, as I verily believe.

C. H. LEONARD.

Subscribed and sworn to before me this 4th day of January, 1938.

WM. M. CARROLL,
County Clerk,
Harney County, Oregon.

[Endorsed]: Filed Jan. 4, 1938. Wm. M. Carroll, County Clerk, by Curtis Smith, Deputy.

[Endorsed]: Filed September 16, 1939. G. H. Marsh, Clerk. [156]

EXHIBIT A

Equity No. 3291

AFFIDAVIT AS PART OF MOTION FOR ORDER OF DEFAULT, AND JUDGMENT AND DECREE.

Plaintiff makes this affidavit in this suit and cause to be used as a part of a Motion asking for order of default and judgment and decree, as follows:

That at the special instance and request of the defendants herein and each and all of them, and for their special benefit the plaintiff refrained and delayed from taking judgment and decree herein after their default, and continued in the sole management and control of said mortgaged property as heretofore, as alleged in the complaint and provided in the mortgages, all in accordance with the instructions and desires of said defendants.

That there has been received from insurance collected for loss of dwelling by fire on Block 51 the sum of $1500.00, and later from the sale of said Block the sum of $1200.00, making a total of $2700.00 that has been applied to the reduction of the principal on the first mortgage held by the Federal Land Bank of Spokane, in accordance with the provisions of said mortgage covering said Block 51 and other properties as set out in plaintiff's complaint, leaving an unmatured balance due on the same of $2912.69, as of Nov. 1st, 1938.

That the unmatured balance due on the Federal Land Bank Mortgage covering the SW¼ of Sec. 30, T. 23 S. R. 31, E. W. M., has been reduced to $3240.41 as of Sept. 1st, 1938. That all installments due on said mortgages have been paid in full to date. Copies of said mortgages are herewith furnished.

That there has been expended by the plaintiff in the premises for the year 1938 for all purposes, including delinquent taxes for former years and past due installments to the Federal Land Bank, insurance, and for necessary improvements, and for labor and costs of administration and taxes for 1938, the sum of $1825.58. [157] That there has been received from all sources from said mortgaged premises, including the 1938 hay crop and the part of the 1937 hay crop left over the sum of $1351.00, leaving a balance of $474.58 due to the plaintiff from the defendants as advancements necessary in the premises over and above the receipts for 1938,

up to this date. That this sum should be added to the sum of $158.83 under the note as explained and set forth in paragraph 26 of plaintiff's complaint. That there is no good reason why this case should not now be closed. That no payments have ever been made on plaintiff's mortgages other than as shown in the complaint.

That there is now due on the note described in paragraph 7 of the complaint the sum of $1563.95 with interest thereon from Aug. 13, 1934, at the rate of 8% per annum, amounting to $2102.02 on Dec. 1st, 1938; and on the notes described in paragraph 16 of the complaint, the sum of $3000.00 with interest thereon from Nov. 6, 1931, to Dec. 1st, 1938, at 8% per annum, amounting to $4696.67; and on the note to C. H. Leonard described in paragraph 26 of the complaint, the sum of $1500.00, with interest from Nov. 6, 1930, at 8% per annum, amounting to $2468.37; and on the note to C. H. Leonard and Fred Haines described in said paragraph 26 there is due to plaintiff the sum of $158.83 with interest at 8% per annum from Jan. 1, 1938, to Dec. 1, 1938, amounting to $170.49, plus the sum of $474.58 for advancements as above stated, amounting to $645.07 with accruing interest on all the principal from Dec. 1, 1938, at 8% per annum, that there is now due and owing and unpaid on said notes from the defendants to the plaintiff the total sum of $9912.13, with accruing interest from Dec. 1, 1938, as herein stated.

That all taxes and installments on said property

due, have been paid in full to date, and no delinquencies on the same now remains.

C. H. LEONARD.

Subscribed and sworn to before me this 25th day of November, 1938.

[Seal] WM. M. CARROLL,
County Clerk. [158]

In the Circuit Court of the State of Oregon for Harney County

Equity No. 3291

C. H. LEONARD,

Plaintiff,

vs.

SAMUEL R. BENNETT, Sometimes written S. R. Bennett, and ALICE BENNETT, his wife, individually, and the BENNETT REALTY COMPANY an Oregon Corporation of Burns, Oregon, SAMUEL R. BENNETT its President, and ALICE BENNETT its Secretary,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, ORDER OF DEFAULT AND JUDGMENT AND DECREE.

Comes now this cause on for hearing this 26th day of November, 1938, upon the motion of plaintiff, by his attorney, C. H. Leonard, asking for an order

of default against the defendants and each and all of them, for want of answer to plaintiff's complaint, and for judgment and decree herein as prayed for in his said complaint and motion filed herein. The plaintiff appearing in person and by his attorney C. H. Leonard, and the defendants, and neither nor any of them appearing either personally or by attorney, but making default herein, and it appearing to the satisfaction of the Court that the said defendants, and each of them and all of them, have been duly and regularly served with summons and complaint as required and directed by law, in Harney County, Oregon, by the Sheriff of said Harney County, Oregon, as follows, to wit: The said Samuel R. Bennett, personally, and the said Bennett Realty Company a corporation thru its President, Samuel R. Bennett, being duly and regularly served as by law required on the 6th day of January, 1938, and the said Alice Bennett, wife of said Samuel R. Bennett, being duly and regularly served as by law required on the 8th day of January, 1938, as shown by the return of the Sheriff herein; that said defendants and each and all of them have failed to answer plaintiff's complaint, or otherwise appear or plead in any way, but have made default herein, and that each and all of them are now in such default, and that the time allowed by law for answering said complaint has long since expired, and therefore the motion of plaintiff's attorney is hereby granted and al-

lowed, and a default for want of answer of the defendants is hereby duly entered according to law.

[159]

And it now appearing to the Court as matters of fact that the allegations contained in plaintiff's complaint and affidavit with motion for judgment and decree are each and every and all of them true, and that as a matter of law, the plaintiff is entitled to the judgment and decree prayed for in his complaint and affidavit with motion for judgment and decree and all thereof. Now, therefore, upon the motion of plaintiff herein, no one appearing in opposition thereto, in anyway whatsoever, and in accordance with the findings of fact and the conclusions of law, heretofore found and made by the Court,

It is ordered, adjudged, and decreed:

(1) That the plaintiff have judgment against said defendants Samuel R. Bennett and Alice Bennett his wife, and each of them, for the total sum of $9912.13, with accruing interest on the principal involved at 8 per cent per annum, from Dec. 1st, 1938, together with the costs and disbursements of suit.

(2) That the plaintiff's mortgages described in his complaint herein, are hereby adjudged and decreed to be valid and subsisting and prior liens upon all of the real and personal property therein described, save and except as to the Federal Land Bank mortgages mentioned; that said lien is prior

in time and superior in right to any lien claim or interest that the defendants, or either or any of them, may have or claim to have in or to said premises and property, or any part thereof, by virtue of any claim of whatsoever kind or nature.

(3) That said defendants, and each and all of them, and any and all persons or interests claiming by, thru or under them, or either or any of them, subsequent to the execution of plaintiff's said mortgages, be forever barred and foreclosed of any and all rights, claims, or equity of redemption in and to said premises and property, and every part thereof.

(4) That the mortgaged premises and property both real and personal described in this suit, and hereinafter described, or so much thereof as may be necessary to raise the amount due to the plaintiff for principal interest, and costs and disbursements, and accruing costs be sold by the sheriff of Harney County, Oregon, according to law and the practice of [160] this court, governing sales of such property, under execution and that the plaintiff may become a purchaser at such sale.

(5) That the money arising from such sale, after deducting the amount of fees and expenses of the same, shall *shall* be paid to the clerk of this court by the sheriff making such sale, to be disbursed by him in accordance with the terms of this decree, that is, first to the payment of the costs and disbursements of this suit, and second to the balance of plaintiff's judgment herein; and that if

the plaintiff should become the purchaser at said sale, then, that he be permitted to offset his judgment herein, or such part thereof as may be equal to the amount of his bid, against such bid to the extent thereof; and if after such sale and application of the proceeds thereof as herein indicated, it be ascertained that such proceeds are insufficient to pay said judgment in full, then that the plaintiff may have judgment over against the said defendants Samuel R. Bennett and Alice Bennett his wife, in the amount of such deficiency, and that execution may issue to enforce the same.

(6) That the sheriff execute a certificate of sale to the purchaser of said property, and at the expiration of the statutory period of redemption a deed for the same to the party entitled thereto; that the purchaser be let into immediate possession of said property and all thereof; that the plaintiff continue in the sole and exclusive possession, operation, control and management of said mortgaged property as heretofore, until said sale is made and the purchaser takes possession under the terms of the sale.

(7) The said mortgaged premises and property, in said complaint as well as hereinafter described, and hereby ordered sold, are described as follows: to wit:

All of Lots 4 and 5 of Sec. (17), and the E½ of the NE¼ of Sec. (18) in T. (23), S. R. (31), E. W. M.;

The SE¼ of Sec. (31), in T. (19), S. R. (31), E.W.M., and Lots 3, 4, and 5, and SE¼ of NW¼, of Sec. (6), in T. (20), S. R. (31), E. W. M.;

The E½ of SW¼, and Lots 3 and 4, in Sec. (30), in T. (23), S. R. (31), E. W. M.;

The E½ of SW¼ of Sec. (8), in T. (23), S. R. (31), E. W. M.; (save and excepting therefrom Tracts or Lots 2, 3, 4, and 5, consisting [161] of 5 acres each, contained therein)—said lands being in Harney County, Oregon; together with tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining, including any and all water rights of every kind and description however evidenced, appurtenant to the same or any part thereof, and any and all dams ditches and other appliances connected with or pertaining in any way to the irrigation of said lands, or interests therein or rights thereto, and any credits or stock of the defendants in the National Farm Loan Association in connection with the Federal Land Bank mortgages on said lands. Subject however to the prior liens of the Federal Land Bank mortgages, herein mentioned.

Dated at Burns, Oregon, this 26th day of November, 1938.

CHARLES W. ELLIS
Circuit Judge.

Recorded K
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[Endorsed]: Filed Nov. 26, 1938. Wm. M. Carroll, County Clerk. [162]

In the Circuit Court of the State of Oregon, for the County of Harney.

#E 3291

CHAS. H. LEONARD,

Plaintiff,

vs.

SAMUEL R. BENNETT, ALICE BENNETT, his wife, individually, and THE BENNETT REALTY CO., a corporation, SAMUEL R. BENNETT, its President & ALICE BENNETT, its Secretary,

Defendants,

OBJECTIONS TO CONFIRMATION OF SALE OF REALTY

Comes now the defendants Samuel R. Bennett and Alice Bennett, co-owners of the real estate sold under the decree in the herein suit by the Sheriff of Harney County, Oregon, on the 30th day of January, 1939, and object to the confirmation of said sale, as follows, to-wit:

1. That on the 22nd day of December, 1938, and during the time that the notice of sale of the premises described in plaintiff's Complaint was being published, the defendant Samuel R. Bennett, then being entitled to the possession of said premises, did file in the United States District Court for Oregon his petition under Section 75 of the National Bankruptcy Act, as amended, as a debtor,

for the purpose of securing the relief provided for by said Section, which said petition was approved by said District Court on said day, and thereafter was referred to the Hon. Richard Krisein, Conciliation Commissioner for Harney County, Oregon, and since said day and date the said debtor, and all of his property, have been under the exclusive jurisdiction of said District Court and said Conciliation Commissioner, and that said petition is now pending before said Commissioner upon his order fixing the date of the first meeting of debtor's creditor as February 25th, 1939.

That on the 24th day of December, 1938, the said debtor, through his attorneys, did personally cause to be served on the aforesaid Sheriff of Harney County, Oregon, a notice to the effect that he had filed a petition under the Frazier-Lempke Act, and cited to him the sub-sections of said Section 75 wherein he was prohibited from continuing with said sale; but that notwithstranding said notice, and in defiance of the provisions of said Act the said sheriff, after continuing the date of said sale from December 31, 1938 to January 30, 1939, sold said premises as is shown by his return. That said sale is without jurisdiction and null and void so far as the defendant Samuel R. Bennett is concerned, and he is still entitled to exclusive possession of said premises.

2. That said sale is further objectionable for the reason that the aforesaid petition in said Dis-

trict Court, while depriving the Sheriff of jurisdiction to make the same, must, of necessity, discouraged prospective bidders from attending and bidding at the same, to be probable loss of the objecting defendants.

Dated at Burns, Oregon, February 4th, 1939.

SAMUEL R. BENNETT
ALICE BENNETT
Objecting Defendants and Co-owners of the Estate sold.
C. B. PHILLIPS
PAT H. DONEGAN
Attorneys for Objecting Defendants

[Endorsed]: Filed Feb. 8, 1939. Wm. M. Carroll, County Clerk. By Curtis Smith, Deputy. [163]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 163 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered B-23787. In the Matter of Samuel R. Bennett, Bankrupt, in which C. H. Leonard, is appellant, and Samuel R. Bennett, is appellee; that said transcript has been prepared by me in accordance with the amended designations of contents of the record on appeal filed

therein and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said amended designations as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is $61.00 and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 2nd day of February, 1940.

[Seal] G. H. MARSH,
Clerk [164]

[Endorsed]: No. 9444. United States Circuit Court of Appeals for the Ninth Circuit. C. H. Leonard, Appellant, vs. Samuel R. Bennett, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed February 9, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9444

In the Matter of
SAMUEL R. BENNETT,
Bankrupt.

C. H. LEONARD,
Appellant,

SAMUEL R. BENNETT,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

To the Clerk of the above entitled Court:

Pursuant to Paragraph 6, Rule 19, Rules of the United States Circuit of Appeals for the Ninth Circuit, the appellant hereby notifies you that he intends to rely upon appeal on the following points:

I.

That Samuel R. Bennett, Debtor above named, is not and was not at the time of the filing of his petition and schedules for a composition and extension under Subdivisions (a) to (r), Section 75 of the Bankruptcy Act, a farmer within the meaning of said Act.

II.

That the petition of the said Samuel R. Bennett, debtor above named, was and is false and fraudulent in that the said debtor was not, at the time of the filing of said petition, the owner of the real property listed therein.

III.

That the District Court erred in finding that the debtor was a farmer and qualified to invoke the provisions of Subdivision (s) of Section 75 of the Bankruptcy Act.

IV.

That the Court erred in adjudicating the debtor a bankrupt under Subdivision (s), Section 75 of the Bankruptcy Act, in that the Debtor was not a farmer within the meaning of the Act.

And appellant hereby designates all of the matter included on pages 1 to 110, inclusive, of the record as that part thereof which the appellant thinks necessary for the consideration of the foregoing points.

JOHN W. McCULLOCH
HUGH L. BIGGS
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

Service of the within Statement is hereby accepted in Multnomah County, Oregon this 7th day

of February, 1940, by receiving a copy thereof, duly certified to as such by Hugh L. Biggs, of Attorneys for Appellant.

S. J. BISCHOFF L.G.
Attorney for Appellee.

[Endorsed]: Filed Feb. 9, 1940. Paul P. O'Brien, Clerk.

No. 9444

In the United States Circuit Court of Appeals

For the Ninth Circuit

C. H. LEONARD,
Appellant,

vs.

SAMUEL R. BENNETT,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

JOHN W. McCULLOCH,
515 Pacific Building,
Portland, Oregon; and
HUGH L. BIGGS,
723 Pittock Block,
Portland, Oregon,
Attorneys for Appellant.
S. J. BISCHOFF,
Public Service Building,
Portland, Oregon; and
PAT H. DONEGAN,
Burns, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND 90808

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In the United States Circuit Court of Appeals

For the Ninth Circuit

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C. H. LEONARD,
Appellant,

vs.

SAMUEL R. BENNETT,
Appellee.

•

APPELLANT'S BRIEF

•

Upon Appeal from the District Court of the United States for the District of Oregon.

•

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION

Jurisdiction of the District Court—On the 22nd day of December, 1938, the appellee-debtor commenced this proceeding by filing in the District Court of the United States for the District of Oregon a Debtor's Petition for composition or extension of his indebtedness, pursuant to the provisions of Sec-

tion 75, Act of March 3, 1933, relating to bankruptcy (R. 1-4).

Appellee-debtor alleged that he "is personally bona fide engaged primarily in farming operations" in the County of Harney, State of Oregon (R. 2).

On December 31, 1938, the appellant filed a motion to dismiss this proceeding for the reason, among others, that appellee was not a farmer within the meaning of Section 75 of the Bankruptcy Act. 11 U.S.C.A., Section 203 (r). (R. 14-15.)

On October 19, 1939, the District Court made and entered an order overruling appellant's motion to dismiss the appellee-debtor's petition for composition or extension of his indebtedness and granting appellee leave to file an amended petition for adjudication as a bankrupt under Section 75 (s) of the Bankruptcy Act. 11 U.S.C.A. 203 (s). (R. 52-53.)

On November 14, 1939, appellee filed in the District Court of the United States for the District of Oregon an Amended Debtor's Petition for adjudication as a bankrupt under Section 75 (s) of the Bankruptcy Act (R. 54-55).

In his Amended Debtor's Petition appellee alleged "that he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) * * *" in Harney County, Oregon (R. 54).

On the 14th day of November, 1939, the District Court made an order adjudicating appellee a bank-

rupt (R. 72).

Appellee sought to invoke the jurisdiction of the District Court of the United States for the District of Oregon as a court of bankruptcy invested by law with jurisdiction within the State of Oregon in proceedings under the Bankruptcy Act. 11 U.S.C.A., Section 11.

Jurisdiction of the Bankruptcy Courts in proceedings under Section 75 (a-s) of the Amended Bankruptcy Act, 11 U.S.C.A. 203 (a-s) extends only to farmers as they are definded in the Act. Title 11 U.S.C.A. 203 (r). *Shyvers vs. Security First National Bank of Los Angeles* (9th Cir.), 108 Fed. (2d) 611.

The jurisdiction of the District Court of the United States for the District of Oregon was and is disputed by the appellant for the reasons (a) that neither the original nor the Amended Debtor's Petition alleges appellee is a farmer as defined in the Amended Bankruptcy Act. 11 U.S.C.A. 203 (r). (b) The record made on the hearing of the appellant's motion to dismiss establishes that appellee is not and was not a farmer within the meaning of the Act. (Post, 13-19)

Jurisdiction of the Circuit Court of Appeals.— This appeal is from the orders of October 19, 1939 (R. 52-53) and of November 14, 1939 (R. 72). Notice of the appeal was filed on the 27th day of November, 1939 (R. 72-73).

Notice of the entry of the order of October 19, 1939, was not served upon the appellant nor filed. In such instances, appeals may be taken within forty days from the entry of the order appealed from, and this appeal was taken within the time provided by statute. 11 U.S.C.A. 48 (a).

Title 28 U.S.C.A., Sec. 225, provides:

> "The Circuit Courts of Appeals shall also have an appellate and supervisory jurisdiction under Sections 47 and 48 of Title 11, U.S.C.A. over all proceedings, controversies and cases had or brought in the District Courts under Title 11, relating to bankruptcy or any of its amendments, and shall exercise the same in the manner prescribed in those sections. * * *"

Title 11 U.S.C.A., Section 47, provides:

> "(a) The circuit courts of appeals are vested with appellate jurisdiction from bankruptcy courts in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in bankruptcy * * * provided where an order or decree involves less than $500 appeal must be upon application to the circuit court of appeals for allowance thereof.
>
> (b) Such appellate jurisdiction shall be exercised by appeal and in the manner and form of appeal."

The orders appealed from do not directly involve specific sums of money and are appealable, therefore, as a matter of right.

In Re Winton Shirt Company (3d Cir.), 104 Fed. (2d) 777.
Robertson v. Berger (2d Cir.), 102 Fed. (2d) 530-1.

STATEMENT OF THE CASE

Samuel R. Bennett, on December 22, 1938, filed in the District Court of the United States for the District of Oregon, a Debtor's Petition for Composition and Extension under the farmer-debtor provision of the Bankruptcy Act. In his petition he did not follow Form No. 65, adopted by the Supreme Court in its General Orders in Bankruptcy of June, 1936, containing the statements to be used by a petitioner; but in lieu thereof stated as follows:

> "That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjoining the said city of Burns which has been operated by himself and his second mortgagee, and is now being operated for their mutual benefit."

The petitioner further stated that he is insolvent and that he desires to effect a composition or extension of time to pay his debts.

The District Court thereafter, on said date, approved the petition as properly filed.

On December 31, 1938, C. H. Leonard, a creditor, filed a motion in said court and cause, to dismiss the petition of the debtor, on the ground that the petitioner was not a farmer, and on other grounds.

On January 25, 1939, the District Court made an order of reference to Richard E. Kriesien, Conciliation Commissioner for Harney County, Oregon,

and ordered that the motion of C. H. Leonard be referred to the said Conciliation Commissioner for consideration.

On the 6th day of March, 1939, the said Conciliation Commissioner made and filed in said court an order as follows:

> "Upon the above petition C. H. Leonard, a creditor, testified that the debtor is a full time employe, namely: District Grazier, District No. 4, Jordan Valley, Oregon, of the Division of Grazing, Department of the Interior of the United States and that said debtor is not personally engaged in farming nor does said debtor derive his principal income from farming activities. The debtor, Samuel R. Bennett, testified that during the past eighteen months he has been a full time employe of the United States Government in the capacity of District Grazier, District No. 4, of the Division of Grazing, Department of Interior on a yearly wage of $1,860.00, and that said wage has been his principal source of income and that he has not been personally engaged in farming during said period. Debtor further testified that if he was successful in effectuating a composition or extension of his debts that he would retain his employment as District Grazier and hire employes to farm his land or if he could borrow sufficient money that he would return to and operate his farm personally, but that he could not indicate with any degree of certainty when he would be in a position to farm his property personally.
>
> "In view of the fact that there was no dispute as to the question of the debtor's employment by the United States Government and as debtor testified that his principal source of income was his employment in the Division of

Grazing, Department of the Interior of the United States and that he was not personally engaged in farming, the Conciliation Commissioner finds that the debtor is not a farmer as defined and classified by Section 75 of the Bankruptcy Act and now therefore, it is

"Ordered, adjudged and decreed that the petition of C. H. Leonard, a creditor herein, praying for the dismissal of the petition of Samuel R. Bennett, debtor, for a composition or extension under Section 75 of the Bankruptcy Act be and is hereby approved and the petition of Samuel R. Bennett be and is hereby dismissed on the ground and for the reason that said debtor is not a farmer within the meaning of Section 75 of the Bankruptcy Act; and the said question is certified to the Honorable Claude McColloch, Judge of the said Court for his opinion thereon."

On March 27, 1939, the debtor filed in said court and cause a proposal for composition and extension, and on said date also filed his petition for review of the order of the Conciliation Commissioner of March 6, 1939.

On April 15, 1939, there was filed in said cause, an order of the District Court, in which said court reserved its decision on the question of whether the debtor is a farmer, and referred the case back to the Conciliation Commissioner to determine whether or not the proposal of the debtor to his creditors already made, or as the same may be modified, includes an equitable and feasible method of liquidation for secured creditors, and for financial rehabilitation for the debtor.

On May 15, 1939, the debtor's amended proposal for composition and extension was filed, and on September 11, 1939, the Conciliation Commissioner made a finding and order on said matter as follows:

> "After due consideration of the amended proposal, the evidence and the exhibits on file herein the Concilation Commissioner finds:
>
> "A. That debtor's amended proposal for a composition and extension does not include an equitable and feasible method of liquidation for the secured creditor, C. H. Leonard, for the reason that the same proposes that the secured creditor, C. H. Leonard, accept the sum of $4,000.00 with interest thereon at the rate of 6% per annum as a full and complete satisfaction and discharge of the judgment possessed by the creditor, C. H. Leonard in excess of $10,000.00. The debtor in his brief sets forth that the contested claim of C. H. Leonard is approximately $5000.00 to $6000.00 but proposes to pay the secured creditor, C. H. Leonard, the sum of $4000.00. There having been no acceptance of the debtor's proposal by a majority in amount and number of the secured creditors the Concilation Commissioner finds that Sub-section 'K' of Section 75 of the Bankruptcy Act where in the fair and reasonable market value of the property is taken into consideration in reducing the amount of the lien of any secured creditor has no application herein.
>
> "B. The Conciliation Commissioner finds that the amended proposal for a composition and extension provides an equitable and feasible method of liquidation for the secured creditor, Federal Land Bank of Spokane, for the reason that the amended proposal contemplates a discharge in full of secured creditor's mortgage.
>
> "C. The Conciliation Commissioner finds that if the secured creditor, C. H. Leonard, was

compelled to accept the sum of $4000.00 as proposed by the debtor, that there is a probability of financial rehabilitation for the debtor but that the amended proposal contains the maximum revenue of which debtor's property is capable of producing."

On the 13th day of September, 1939, there was filed in said cause Debtor's Exceptions to the findings of the Conciliation Commissioner, and on the 30th day of September, the District Court entered in said cause the following order:

"Efforts to effect a composition having failed, and debtor, through his attorney, having applied in open court for leave to file an amended petition under Sub-section (s) of the Farmer-Debtor Act, such leave is hereby granted upon condition that amended petition be filed within thirty (30) days from date hereof."

And thereafter on the 19th day of October, 1939, the said District Court, made and entered in said cause the following order:

"This cause coming on for hearing on the motions of C. H. Leonard and the Federal Land Bank of Spokane to dismiss the petition filed by the debtor under Subdivisions (a) to (r) of the Farmer-Debtor Act on the grounds (1) that the debtor is not a farmer and (2) that the petition was not filed in good faith; the cause having been referred to Richard E. Kriesien, Conciliation Commissioner, upon said issues, and the Concilation Commissioner having filed herein reports, exceptions to said reports having been filed and the said exceptions having been argued to the Court, and the Court being now fully advised in the premises, it is

"Ordered that the exceptions of the debtor to the reports of the Conciliation Commissioner be and the same hereby are sustained; and it is further

"Ordered that the said motions of the objecting creditors, C. H. Leonard and Federal Land Bank of Spokane, be and the same hereby are denied, without prejudice to the right of the creditors to raise the question of probability of rehabilitation in the event that the debtor should file an amended petition under Subdivision (s) of the Farmer-Debtor Act, in which event the record heretofore made upon that question may be used by either party upon the submission of that question for determination, and the parties may, in that event, submit such additional evidence upon that question that they may desire.

"And it appearing further from the report of the Conciliation Commissioner filed herein that efforts to effect a composition under Subdivisions (a) to (r) of said Act have failed by reason of the failure of the debtor to obtain the consents of the creditors as required by law, and the debtor having applied to the Court for leave to file an amended petition under Subdivision (s) of said Act, it is further

"Ordered that the debtor is hereby granted leave to file an amended petition under Subdivision (s) of said Act, provided said amended petition is filed within thirty (30) days from the date hereof; and it is further

"Ordered that the order heretofore made and entered on September 30, 1939, be and the same hereby is vacated." (R. 52-3.)

Thereafter, on November 14, 1939, there was filed in said court the Amended Petition and Schedules of Samuel R. Bennett, and on said date the District

Court made and entered in said cause an order adjudging said Samuel R. Bennett, a bankrupt (R. 54-5).

QUESTIONS ON APPEAL

There are only two questions raised on this appeal:

(1) Do the appellee's petitions for (a) composition or extension of his indebtedness and (b) for adjudication in bankruptcy under the Farmer-Debtor Act as amended in 1935, 11 U.S.C.A. 203 (a-s) state sufficient facts to sustain the District Court's jurisdiction?

Appellant contends that they are fatally defective in that they do not allege that appellee is or was *personally* engaged in *farming,* nor deriving the principal part of his revenue from farming as that term is defined in Subsection (R) of Section 75 of the Bankruptcy Act as amended by Act, May 15, 1935.

The sufficiency of the petition itself in this respect was not directly challenged in the District Court, but being jurisdictional is not waived and may be presented on appeal.

(2) Is the debtor-appellee in fact a farmer within the meaning of the Act, as shown by the sworn testimony and evidence taken by the Conciliation Commissioner at the hearing held on appellant's Motion to Dismiss the original petition?

This issue was certified to the District Court by the Conciliation Commissioner on the record and findings of the Conciliation Commissioner (R. 37-8) and was adjudicated adversely to appellant by the District Court's order of October 19, 1939 (R. 52-53) and the Court's order of November 14, 1939, adjudging appellee a bankrupt under Subsection (s) of the Farmer-Debtor Act (R. 72).

SPECIFICATION OF ERRORS RELIED UPON

I.

That the District Court was without jurisdiction to approve the petition filed December 22, 1938, or to grant any relief thereunder, for the reason that the petition on its face shows appellee is not a farmer within the meaning of the Act.

II.

The court erred in denying appellant's motion to dismiss Appellee-Debtor's petition for composition and extension on the ground appellee was not a farmer, and in finding that appellee was a "farmer" within the meaning of the Act.

III.

The court erred in adjudging appellee a bankrupt under 75 (s) of the Bankruptcy Act as amended, for the reasons that the amended petition for adjudication in bankruptcy under (s) showed on its face that the appellee was not a farmer within the meaning of said Act and the record of testimony and evi-

dence before the court disclosed that the appellee was not in fact a farmer within the meaning of the Act.

SPECIFICATION OF ERROR NO. I.

That the District Court was without jurisdiction to approve the petition filed December 22, 1938, or to grant any relief thereunder, for the reason that the petition on its face shows appellee is not a farmer within the meaning of the Act.

POINTS AND AUTHORITIES

I.

"The term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations." Subdivision (r), Section 75, Bankruptcy Act as amended 1935.

11 U.S.C.A., Section 203, Subdivision (r).

II.

Where its lack of jurisdiction affirmatively appears of record, it is the duty of a court, sua sponte, to decline jurisdiction.

U. S. v. Corrick, 298 U.S. 435; 80 L. Ed. 1263.
Morris v. Gilmer, 129 U.S. 315, 326.
Hartog v. Memory, 116 U.S. 586; 29 L. Ed. 725.

ARGUMENT

The Bankruptcy Act under consideration is a special act intended to operate for a limited time and to apply to a particular class.

The Act carefully and specifically defines the term "farmer", for whose benefit the Act was passed. No one can claim the benefits of the farmer-debtor provision of the Act, unless the applicant can bring himself within the definition of "farmer" as found in Subdivision (r) of Section 75 of the Act as amended in 1935.

The Act in attempting to meet a national emergency carefully defines the term "farmer" to be (a) an individual who is primarily bona fide personally engaged in producing products of the soil; (b) an individual who is primarily bona fide personally engaged in dairy farming; (c) an individual who is primarily bona fide personally engaged in production of poultry; (d) any individual who is primarily bona fide personally engaged in the production of livestock; (e) any individual who is primarily bona fide personally engaged in the production of poultry products or livestock products in their unmanufactured state; and (f) any individual, the principal part of whose income is derived from his operations in primarily bona fide personally producing products of the soil, dairy farming, producing poultry, producing livestock, producing poultry products or livestock products in their unmanufactured state.

Any person who does not come within the foregoing definition of "farmer" is not entitled to the benefits of the Act.

An individual to be classed as a "farmer" under the Act must personally, primarily and individually be engaged either in producing products of the soil, dairy farming, producing poultry, producing livestock, producing poultry products or livestock products in their unmanufactured state. If an individual can comply with any one of the foregoing requirements, then he is a "farmer".

The Act further provides that an individual, the principal part of whose income is derived from one or more of "the foregoing operations" shall be classed a "farmer". Attention is called to the fact that "the foregoing operations" are all personal operations. The person claiming the benefits of the Act must show that he personally performed the acts mentioned in the Bankruptcy Act.

The petitioner on December 22, 1938, filed his petition asking for relief "under Section 75, Act of March 31, 1933." In his petition then filed he did not state sufficient facts to give the Bankruptcy Court jurisdiction. The following is his statement in an attempt to comply with Subdivision (r) of Section 75 of the Act:

> "The petition of Samuel R. Bennett of Burns, in the County of Harney, District, State of Oregon, who is at present employed as a District Grazier by the Division of Grazing of the

> Department of the Interior at Burns, respectfully represents that he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjacent to said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

The foregoing statement falls short of the requirements of the Bankruptcy Act. There is no showing of any primarily bona fide or personal engagements in producing products of the soil by the petitioner either then or at any other time. The petition does not follow or conform to the form of petition prescribed by the Supreme Court in its General Orders in Bankruptcy. The then form No. 65, which is now form No. 63, requires the petitioner to say as follows:

> "That he is primarily bona fide personally engaged in producing products of the soil (or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from one or more of the foregoing operations as follows." 298 U.S. 702.

By comparing the statement of "farming operations" as set forth in debtor's petition with Subsection (r) of the Bankruptcy Act as amended in 1935 and also with form No. 65 as promulgated by the Supreme Court, it is clearly shown that the petitioner in his petition did not state sufficient facts to

give the court jurisdiction.

The statement of the debtor "that he is personally bona fide primarily engaged in farming operations, or that the principal part of his income is derived from farming operations" is the identical language considered by the United States Supreme Court in *Louisville Bank vs. Radford,* 295 U.S. 599, in which the court said:

> "The Act affords relief not only to those owners who operate their farms, but also to all individual land owners, and to persons who are merely capitalist absentees."

The court held this Act unconstitutional and Congress carefully amended the Act and defined "farmer" as set forth in the 1935 amendment as above quoted. Under the amended Act the petition of the debtor failed to show that the debtor was an individual who was entitled to the benefits of the Act of 1935.

Court Bound to Notice Jurisdictional Defects Sua Sponte

When a petition is presented to the court, it is the duty of the court to determine whether or not the petition on its face shows that the petitioner has brought himself within the jurisdiction of the court. If the petition does so show, then the court may approve it as properly filed. If the petition does not meet the requirements and state the necessary jurisdictional facts, then it is the duty of the court to dismiss it for want of jurisdiction. In,—

U. S. v. Corrick, 298 U.S. 435; 80 L. Ed. 1263. the Supreme Court said:

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause. *And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties made no contention concerning it.* While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." (Emphasis supplied.)

The petition of Bennett filed December 22, 1938, clearly shows that the petitioner was seeking relief under an act which was no longer in effect. When the petitioner advised the court that he was asking "for composition or extension under Section 75 of the Act of March 3, 1933", the court should have then advised the petitioner that the court could not proceed under that act. When the court discovered from the petition that the only claim of "farming operation" of the petitioner was that of an absentee-landowner and that no claim was made in the petition that the petitioner was personally primarily or bona fide engaged in such farming operations, it was then the duty of the court to dismiss the petition for want of jurisdiction.

SPECIFICATION OF ERROR NO. II.

The court erred in denying appellant's motion to dismiss Appellee-Debtor's petition for composition and extension on the ground appellee was not a "farmer", and in finding that appellee was a "farmer" within the meaning of the Act.

POINTS AND AUTHORITIES

A "farmer" within the meaning of Subdivision (r) of the Bankruptcy Act as amended August 28, 1935, must be an individual who is primarily bona fide personally engaged in producing products of the soil, or a person, the principal part of whose income is derived from his personal activities in producing products of the soil.

Shyvers v. Security First National Bank of Los Angeles, 108 Fed. (2d) 611.
In Re Horner, 104 Fed. (2d) 600.
In Re Davis, 22 Fed. Supp. 12.
In Re Olson, 21 Fed. Supp. 504.

ARGUMENT

The original petition filed by the debtor does not show that the petitioner is a farmer within the meaning of Subdivision (r) of Section 75 of the Bankruptcy Act as amended in 1935. The debtor's schedule B-2, paragraphs (g), (h) and (k) (p. 9-R) shows that the debtor then had no carriages or other vehicles; no farming stock or implements of husbandry; no machinery, fixtures, apparatus or tools.

The debtor (p. 89-R) says his work horses and farming machinery were disposed of in 1934,—more than four years before he filed his debtor's petition.

In his narrative statement (pp. 81-89 R) the petitioner submits his proof of being a farmer as follows:

> "I have been connected with farming and livestock operations all my life * * *. I worked on my father's ranch until I was 24 or 25 years of age. I went into the Forestry Service in 1909, and was in that service 15 years. During the time I was in the Forestry Service I had a 160-acre ranch up the river, and some livestock, about twenty head. The principal crop was truck farming, potatoes and alfalfa. During my connection with the Bureau of Forestry, my duties required full time with the service, and I farmed through hired help. My brother worked the ranch." (p. 81 R).

Witness then testified that he acquired the Swick place, the Mace place and the Thornburg place and then says:

> "I quit the Forestry Service in 1924 and devoted all my time to the operation of these lands (83 R). I moved away from the property in 1930 because I became involved so heavily and had so much against the land (p. 83 R). At that time the mortgage indebtedness against the land was around $18,000. That included the amount owed to the Federal Land Bank and to Leonard. In 1935 the mortgages to the Federal Land Bank upon these tracts were about $10,000, and I owed Mr. Leonard about $8,000, making a total of about $18,000. At that time the indebtedness was such that it was impossible for me to take it up (p. 84 R). The amount of

the decree in the suit which Mr. Leonard filed against me was about $18,000, together with the Federal Land Bank. In my opinion the fair value of this property at the present time is about $18,000" (84-R).

(Question by Conciliation Commissioner, p. 86-R)

"Q. Your present income since you have been employed by the Division of Grazing has been from your salary?

A. Yes.

Q. At no time have you been deriving any income from the farming of the land within the last 18 months, since you have been employed by the Division of Grazing? (86-R)

A. I have had a lot of cattle during that period and have done some farming.

Q. C. C. What has your income been from your farming operations since the time you entered the employ of the Government?

A. My personal living expenses and bills have all been paid by my salary.

Q. C. C. Can you estimate how much income you have derived from farming?

A. No.

Q. C. C. Have you personally engaged in farming since you have been employed by the United States Government?

A. I have not personally done my farming myself.

Q. C. C. Have you done any farming lately?

A. I am running a place on the lake for my daughter and had a band of cattle last winter.

Q. C. C. How was that run?

A. Hired help.

Q. C. C. You are the administrator?

A. Yes, sir. I stayed out in the Trout Creek ranch from about 1930 to 1935. Then I moved back here and run cattle for my daughter for about a year. I have lived in the vicinity of

> Burns ever since. From the time I came back to Burns until I took the grazing position I was contracting in the summer for hay and running these cattle for my daughter. I wasn't working on the Swick land at the time. Mr. Leonard was operating under the agreement that he had with me, that the income would be applied to the indebtedness." (88-R)

Whatever may be claimed for farming operations of Bennett prior to 1934, we contend there is no evidence of any farming operations by him since 1934. According to his own statement as found on p. 89 of the record, he closed out whatever farming operations he then had in 1934. His statement is as follows:

> "When I was farming on the Swick land I had work horses, plows, harrows, mowing machines and milking machines. They were sold in 1934."

The foregoing testimony of the debtor does not show that the debtor at the time he filed his petition was a "farmer" within the meaning of the Bankruptcy Act. The petition does not show,—

> "That he is primarily bona fide personally engaged in producing products of the soil (or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from one or more of the foregoing operations."

This is the language of form No. 65 adopted by the Supreme Court.

This court in

Shyvers v. Security First Nat'l Bank of Los Angeles, 108 Fed. (2d) 611 (9th Cir.)

holds that to qualify as a farmer within the meaning of the Bankruptcy Act the petitioner must be one who is primarily bona fide *personally* engaged in producing products of the soil, and does not include an absentee landlord. The court further says:

> "We conclude that to come within this subdivision, the debtor must personally be engaged in farming. It is not enough to own farm lands which he or she leases to others who operate them." (p. 612).

In Re Olson, 21 Fed. Supp. 504,

the court, in considering the same question, says:

> "A careful reading of Subdivision (r) I think discloses that every operation enumerated to be engaged in by the individual is a personal operation." (p. 508)

In Re Davis, 22 Fed. Supp. 12

the court, in considering this same subsection, says:

> "A careful reading of the preceding language of the subdivision I think makes it clear that every operation enumerated to be engaged in by an individual is a personal operation. I conclude that if the debtor be a farmer within the meaning of this subdivision the debtor must be engaged in farming personally, and not merely own farm land which he or she leases to others who operate it" (p. 13).

In Re Horner, 104 Fed. (2d) 600

the Circuit Court of Appeals for the Seventh Circuit in considering the same question, says:

> "The test in determining whether a debtor seeking a composition or extension of his debts under the section of the Bankruptcy Act dealing with agricultural composition and extension was a 'farmer' within the meaning of the Act was whether he was primarily bona fide personally engaged in producing products of the soil or whether the principal part of his income was derived from his activities in producing products of the soil" (p. 600).

Before the amendment of August, 1935, Subsection (r) of Section 75 defined "farmer" as follows:

> "For the purpose of this section and Section 74, the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations." 47 Stat. 1473.

After the decision of the Supreme Court of the United States in the *Radford* case, the foregoing definition of farmer was changed by Congress by the enactment of the amendment of 1935. 11 U.S.C. A., Section 203 (r).

After this amendment was adopted by Congress, the United States Supreme Court amended form No. 65 and by Rule 38 prescribed that the forms adopted by the court shall be observed and used. 298 U.S. 697-702.

The petitioner has made no attempt to qualify as a farmer under the Bankruptcy Act as amended in 1935. By his petition and by his testimony he attempts to qualify as a farmer under a statute which was not then in effect. It is not necessary to determine whether or not a statute not in effect has been complied with. We think it is clear that there is a failure to comply with the requirements of the present statute and that the court erred in not sustaining the motion of Leonard to dismiss.

SPECIFICATION OF ERROR NO. III.

The court erred in adjudging appellee a bankrupt under 75 (s) of the Bankruptcy Act as amended, for the reasons that the amended petition for adjudication in bankruptcy under (s) showed on its face that the appellee was not a farmer within the meaning of said Act and the record of testimony and evidence before the court disclosed that the appellee was not in fact a farmer within the meaning of the Act.

POINTS AND AUTHORITIES

Upon the filing of the debtor's petition, the judge shall enter an order either approving it as properly filed or dismissing it for want of jurisdiction.

Subsection (a) of Section 202, T. 11 U.S.C.A.
In Re Palma Bros., 8 Fed. Supp. 920.

ARGUMENT

In his amended petition filed November 14, 1939, the petitioner still seeks relief under a law not at that time in effect. He says that he is "personally bona fide engaged primarily in farming operations or that the principal part of his income is derived from farming operations" as follows: He then makes no further statement of farming operations. He made no claim of being a farmer within the meaning of Subdivision (r) of Section 75 of the Bankruptcy Act as amended in 1935. At the time the order of November 14, 1939, was made there was before the court the original petition, the testimony of the debtor and the amended petition, all of which show that the debtor is not a farmer within the meaning of Subdivision (r) of Section 75 of the Act of 1935. All of which shows that the court has no jurisdiction and that the original petition and the amended petition should have been dismissed for want of jurisdiction.

Respectfully submitted,

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No. 9444

In the United States
Circuit Court of Appeals
For the Ninth Circuit

C. H. LEONARD,

Appellant,

vs.

SAMUEL H. BENNETT,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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Circuit Court of Appeals
For the Ninth Circuit

C. H. LEONARD,

Appellant,

vs.

SAMUEL H. BENNETT,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

The appellee in his answering brief contends that the debtor's petition filed December 22, 1938, stated jurisdictional facts. We now examine the petition to determine whether it states sufficient facts to give the court jurisdiction.

The petition of December 22, 1938, is a debtor's petition for composition and extension. The petition says it is filed "under Section 75, Act of March 3, 1933."

After the enactment by Congress of Section 75 of the Act of March 3, 1933, the Supreme Court of the United States prescribed and adopted Form No. 65, to be used by a debtor in proceedings under the Act of March 3, 1933. This form was adopted April 17, 1933. Form No. 65 as adopted at that time is the form used by the debtor in his first petition filed herein December 22, 1938.

After the decision of the Supreme Court in the case of *Louisville Bank vs. Radford,* 295 U.S. 599, the Congress by its amendment of 1935, 11 U.S.C.A., Section 203, Subdivision (r), changed the Bankruptcy Act as relating to a farmer-debtor. Thereafter, on June 1, 1936, the Supreme Court in its General Orders in Bankruptcy changed Form No. 65 as adopted April, 1933, to Form No. 65 as adopted June 1, 1936. This new Form No. 65 requires the petitioner to state in his petition as follows:

> "That he is primarily bona fide personally engaged in producing products of the soil, or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from one or more of the foregoing operations." 298 U.S. 702.

Form No. 65 as adopted April, 1933, and in effect until June 1, 1936, is as follows:

> "Petitioner respectfully represents that he is personally bona fide engaged primarily in farming operations (or that the principal part

of his income is derived from farming operations as follows * * *".

The petition filed by the debtor on December 22, 1938, did not adopt or follow Form No. 65 then in effect, but did adopt and follow the old Form No. 65 which at that time was not in effect.

The question now under consideration is—Does the petition of December 22, 1938, state sufficient facts to give the court jurisdiction to proceed under the amendment of 1935.

At the time the debtor's petition was filed in 1938 the Bankruptcy Act of 1935 required that the benefits of the farmer-debtor provision of the Act should extend to and include only a person who is primarily bona fide personally engaged in producing products of the soil, or personally engaged in dairying, raising poultry or livestock, or the principal part of whose income is derived from one or more of the foregoing operations.

Section 75, Subdivision (r) of the Bankruptcy Act of 1933 defined *farmer* as follows: "The term *farmer* means any individual who is personally bona fide engaged primarily in farming operations, or the principal part of whose income is derived from farming operations." 47 Stat. 1473.

The debtor in his petition does not state that he is personally engaged in producing products of the soil. He does not state that he is personally engaged in dairying or raising poultry or livestock, or that

he is personally engaged in any of the occupations mentioned or enumerated in Subsection (r) of Section 75 of the Act of 1935.

The debtor's petition of 1938 says:

"DEBTOR'S PETITION

For Composition or Extension Under Section 75, Act of March 3, 1933.

"To the Honorable James Alger Fee and Claud H. McColloch, Judges of the District Court of the United States for the District of Oregon, ... Division.

"The Petition of Samuel R. Bennett of Burns, in the County of Harney, District, State of Oregon, who is at present employed as a District Grazier by the Division of Grazing of the Department of Interior at Burns:

"Respectfully Represents: That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjacent to said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

It will be noted that the petitioner does not allege that he is personally engaged in producing products of the soil. He does not allege that he is a *farmer*. He says he is employed as a District Grazier by the Division of Grazing of the Department of the Interior. The effect of the foregoing petition is that the petitioner states that he is not personally bona fide and primarily engaged in producing products of the soil. He makes a direct statement that he is engaged in an occupation that would exclude him

from the benefits of the farmer-debtor benefits of the Bankruptcy Act.

The words "farming operations" used by the debtor in his petition are not to be found in the 1935 amendment.

In explanation of the words "farming operations" petitioner further states "he owns a farm of 200 acres adjoining the said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

A person may *operate* a farm through a tenant or lessee or hired help, without the owner being personally engaged in producing products of the soil. The debtor's petition shows that the *operation* of the farm did not involve or include any personal efforts or action on his part. He was wholly engaged in another and dissimilar occupation. He not only neglects to state in his petition that he is personally engaged in producing products of the soil, but he does state he is engaged in an occupation that excludes the possibility that he might be engaged in producing products of the soil.

The Supreme Court of the United States by Rule XXXVIII, 298 U.S. 697-702, says:

> "The several forms annexed to these General Orders shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

The order of the Supreme Court to observe and use Form No. 65 adopted June 1, 1936, was not complied with in this case. Instead of observing and using the form as directed, the petitioner elected to use a form that had been abrogated, and also tried to proceed in the Federal Court under a law that had not been in effect for four years.

Appellant in his Point I, page 4 of his brief says:

> "The petitions sufficiently allege that petitioner is a farmer and are substantial compliances with the requirements of the official forms."

An examination of the petition filed December 22, 1938, will show that no allegation in that petition attempts to show that petitioner is a *farmer*. The word *farmer* is not used in that petition. Subdivision (r) of Section 75 of the 1935 Act defines the word "farmer". There is not a single statement or sentence in the petition of December 22, 1938, to indicate that any attempt is made in that petition to show that the petitioner is a farmer as defined by Subsection (r) of Section 75. Neither is there any attempt in the petition to allege or show that petitioner is of the class of persons designated and described in Subsection (r) of Section 75 of the Act of 1935. It is plain as shown by the petition that the petitioner was attempting to qualify for the relief granted by the 1933 amendment. Certainly the petition as filed does not state facts to show that petitioner is entitled to the benefits of the 1935 amendment.

Appellant's Point II is as follows:

> "The record establishes that the debtor was a farmer within the meaning of Section 75 of the Bankruptcy Act."

Section 75, Subdivision (r) of the Bankruptcy Act defines a farmer to be a person who is primarily bona fide and personally engaged in producing products of the soil, or dairying, raising livestock or poultry and the other occupations mentioned in that subsection. Appellee then must contend that the record in this case *establishes* that the debtor is primarily bona fide personally engaged in producing products of the soil.

We briefly review the record as shown by the testimony of the debtor. He says he was born on a farm and lived on his father's farm until he was about 24 years of age, when he became a full-time employee in the Forestry Service. He remained in the Forestry Service for about 15 years. In 1921 and later he acquired the farm lands near Burns involved in this controversy. In 1924 he quit the Forestry Service and devoted his entire time to these ranches, running a dairy, cutting hay and running and selling livestock. He moved away from these properties in the spring of 1930, because he became involved so heavily and had so much against the land. He went to the south end of the county and tried to farm for five seasons. In 1934 all of his stock, work horses, cattle and farming implements were sold. Since 1934 he has owned no work stock

or farming implements. Since 1934 and up to the time he began working for the Division of Grazing in 1937 he ran some cattle for his daughter, put up some hay under contract and has done some farming for his daughter. That was done through hired help. He was the administrator. He began working for the Division of Grazing in 1937 and is still so working and does not expect to resign or give up his job.

Appellee argues, page 26 of his brief, that "Debtor's absence from the mortgaged lands was temporary. The mortgagee was operating them for the debtor. The mortgagee's operations were in a true sense the debtor's operations."

The debtor has now been absent from the mortgaged premises since the spring of 1930. To this time, he has been absent from the premises mentioned in his petition for eleven cropping seasons. Debtor's attorney says in his brief that this is only a temporary absence and that debtor has only ceased to farm temporarily. He does not suggest how much time should elapse to remove the temporary status.

The fact is that for eleven cropping seasons debtor by his own testimony has not personally been engaged in producing products of the soil on the 200 acres of land near Burns which he says in his petition "has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

Appellee argues that the appellate court must look to the whole record, including the evidence, to determine whether jurisdictional facts are stated in the petition. If this is the rule, petitioner is in a more precarious condition than he would be without such a rule. Let us examine the situation. The petitioner in his petition makes statements of his "farming operations", and the operations by himself and second mortgagee. We challenge the sufficiency of such statements. The appellee then says we will determine the meaning and sufficiency of the petition by the evidence. We then consider debtor's own testimony as to the meaning of his statements in the petition and we find from the testimony of the petitioner that for a period of ten years he has had no personal part in the farming operations mentioned in his petition. He says that in his petition, saying "the 200 acres adjoining said City of Burns which has been operated by himself and his second mortgage and is now being so operated for their mutual benefit" means this—the petitioner since the spring of 1930 has had absolutely nothing to do with the farming operations on these lands. That during all times since the spring of 1930 he has had no personal or active part in what he calls in his petition "farming operations". With this explanation of the meaning of the language in the petition, the court is asked to say that the petitioner since the spring of 1930 has been and now is primarily bona fide personally engaged in producing products of the soil on the 200 acres of land adjacent to the City of Burns.

We earnestly contend that the petition of December 22, 1938, construed with or without the record in the case, clearly shows that the debtor was not entitled to the benefits of the farmer-debtor provisions of the Act of 1935. It follows, therefore, that the court was without jurisdiction.

It is further argued in debtor's brief that the Chandler Act of 1938 changed the definition of "farmer", and that now under the Chandler Act the word "farmer" means an individual personally engaged in farming or tillage of the soil.

Apparently, the Supreme Court of the United States takes the position that the Chandler Act did not amend or change the Act of 1935 defining farmer. No new form has been prepared by the Supreme Court to meet the provisions or requirements of the Chandler Act, and the form prescribed by the court for proceedings under the Act of 1935 still is used by direction of the Supreme Court.

If, however, the Chandler Act is an amendment of the Act of 1935, the petitioner in this case is in no better, and perhaps not as good, position as he would be under the 1935 Act. The 1935 Act requires that the petitioner should be personally engaged in producing products of the soil. The Chandler Act requires that the petitioner shall be personally engaged in tillage of the soil.

If tillage of the soil has a different meaning than producing products of the soil, it would seem that

the change in the law is unfavorable to the petitioner. The product of the soil produced on the lands involved in this case is wild hay. Wild hay, we believe, is a product of the soil within the meaning of the 1935 Act. If the Chandler Act has changed the 1935 Act and if the requirement now is that the petitioner must be personally engaged in tillage of the soil, the question would arise as to whether cutting and stacking wild hay is tillage of the soil. If it is not, then the petitioner could not claim to be a farmer even if for the last ten years he had personally cut and stacked all the wild hay grown on the 200 acres of land mentioned in his petition.

But it is shown from the testimony of the petitioner, that since the spring of 1930 he has had no personal part in either the tillage of the soil, or in producing products of the soil on the lands described in his petition.

If the petitioner was ever a farmer, he had ceased to be a farmer long before the enactment of the farmer-debtor Act. Certainly, at the time the petition herein was filed, the petitioner was not a farmer.

Respectfully submitted,

J. W. McCULLOCH,
HUGH L. BIGGS,
Attorneys for Appellant.

No. 9451

United States

Circuit Court of Appeals

For the Ninth Circuit.

ONG GUEY FOON,

Appellant,

vs.

HARRY B. BLEE, Assistant Director of Immigration and Naturalization,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

YOU CHUNG HONG, Esq.,
445 Ginling Way
Chinatown on North Broadway,
Los Angeles, California.

For Appellee:

BEN HARRISON, Esq.,
United States Attorney,

RUSSELL K. LAMBEAU, Esq.,
Assistant United States Attorney,
Federal Building,
Los Angeles, California. [1*]

In the United States District Court in and for the Southern District of California, Central Division.

No. 14088-C

In the Matter of the Application of

ONG GUEY FOON

For a Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judge in the Above-Entitled Court:

Your Petitioner, Ong Guey Bet, Respectfully States:

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*Page numbering appearing at foot of page of original certified Transcript of Record.

I.

That he is a natural born citizen of the United States under the provisions of Section 1993 of the Revised Statutes, and that as evidence of his said citizenship, he holds Citizen's Certificate of Identity No. 19565 which was issued to him by the Commissioner of Immigration at the port of San Francisco, California, on July 13, 1915 after thorough investigation of his status as the lawful son of Ong You, a native born United States Citizen.

II.

That on November 20, 1938, your petitioner's blood brother Ong Guey Foon came from China to the United States and applied to the Immigration Authorities at the port of San Pedro, California, for admission as a natural born citizen being the foreign born son of his father Ong You, a native born citizen of the United States in the same manner as your petitioner had heretofore done under the aforesaid provisions of Section 1993 of the Revised Statutes as of before the Amendment of May 24, 1934; that on January 6, 1939 the said Ong Guey Foon was brought before a board of special inquiry for examination as to his admissibility and thereupon your petitioner as well as one Mrs. Quan Shee appeared before the said board to testify on his behalf; that due to the death of his father Ong You in Stockton, California, on or about January 15, 1922, this witness was not produced but his perpetuated testimony contained in San Francisco Immi-

gration Record No. 9599/90 and other connecting files was [2] available and produced for the use of the said board of special inquiry; that after hearing the evidence concerning the said applicant's ancestors, parents, brothers, sisters, children, home, home life, ancestral village, and all collateral matters pertaining to his relation to his father, Ong You, the said board denied the admission of the applicant Ong Guey Foon on the three following grounds: (1) that the applicant Ong Guey Foon testified before the board that there are now fifteen dwelling houses and one lantern house in his home village in China while your petitioner's immigration record showed that your petitioner testified in 1915, almost twenty-four years ago, that there were only twelve houses in that village; (2) that the said applicant was unable to give correctly all the exact ages and order of birth of some twenty odd children of his uncle Ong Lok's seven sons; and (3) that the said applicant was unable to identify your petitioner's photograph taken in 1921 and a 1917 photograph of his brother Ong Guey Chuck;

III.

That an appeal from the aforesaid excluding decision by the board of special inquiry was forthwith taken to the Board of Review of the Secretary of Labor but appellate board on or about April 28, 1939 sent the record back to the board of special inquiry for consideration of the question whether the applicant Ong Guey Foon was identical with

his brother Ong Guey Chuck who was unsuccessful in gaining admission to this country in 1917; that without notice to the applicant's attorney, the board ordered a photograph of the applicant to be taken, reopened the hearing on May 3, 1939, called one of their fellow-officer, Immigrant Inspector Raymond M. Tong, to testify that the applicant Ong Guey Foon and Ong Guey Chuck were one and the same person, and added this question of identity as an additional ground for the said applicant's exclusion; that subsequently, the applicant's attorney was notified of the second excluding order and Counsel thereupon requested that an opportunity be permitted to introduce findings from the scientific examination of the photograph and person of the applicant with the photograph of his brother Ong Guey Chuck used by the board of special inquiry; that on May 31, 1939, the case was again reopened for the testimony of Mr. John L. Haris, a well-known identification [3] expert of this city, who found that the said applicant is not his brother Ong Guey Chuck; and that at the conclusion of Mr. Harris' testimony as to his research and findings as well as the introduction of demonstration exhibits on behalf of the applicant, the board of special inquiry for the third time ordered the said applicant's exclusion;

IV.

That thereafter an appeal of the excluding decision of the examining board was again taken to the

board of review of the Secretary of Labor; that after a delay of some five months during which time the said applicant was in detention, the Secretary of Labor on September 30, 1939, affirmed the examining board's excluding decision and instructed Walter E. Carr, District Director of Immigration and Naturalization for the port of San Pedro, California, to deport the said Ong Guey Foon on the first available steamer to China; and that your petitioner has been informed and believes that the first available steamer would be the SS. "President Pierce" which will sail from this port on October 2nd, 1939 and that unless this Honorable Court intervenes, the said Ong Guey Foon will be so deported from the United States; and,

V.

That the evidence adduced before the Immigration Authorities has established to a reasonable and substantial certainty that the applicant Ong Guey Foon was the son of his father, Ong You, and that the findings on which the exclusion order based were arbitrary and unfair (1) because there was a period of some twenty-four years intervening between your petitioner's description of his home-village given in 1915 and the testimony of the applicant Ong Guey Foon given at San Pedro in 1939 describing the same village and the Immigration Authorities based their excluding decision on the increase of only 3 houses during this time and deliberately ignored the natural constantly changing

order of life and events as they are everywhere experienced, U. S. ex rel Noon v. Day, 44 Fed. (2d) 239; (2) because the applicant Ong Guey Foon has seven cousins and these cousins have altogether twenty some children of various ages, several of whom are twins and the fact said applicant testified that the two youngest children, one a boy and the other a girl, of his cousin Ong [4] Nguey Gim was approximately four and five years old respectively whereas the immigration record showed that these were twins was mere trifling detail of no importance and materiality to the issue presented in his case; and (3) because the board of special inquiry only presented the 1921 photograph of your petitioner to the said applicant for identification the same being partially mutilated with stamping by immigration officers over the face and refrained from showing other available photographs or your petitioner in person for identification purposes, and the photograph of Ong Guey Chuck was taken almost twenty-two years ago and the said applicant has not seen him since 1917 as he went from Hong Kong to the Straits Settlement directly from there after his return from this country, and further, our own Circuit Court of Appeals holds that failure to recognize photographs under similar circumstances is immaterial, Louie Poy Hok v. Nagle, 48 Fed. (2d) 753; (4) because there was no evidence to support the assertion that applicant was Ong Guey Chuck as it is nothing extraordinary for brothers to bear remarkable resemblance to one

another, and the Immigration Authorities deliberately ignored the scientific assistance rendered.

VI.

Your petitioner further states that the said Ong Guey Foon has been since November 20th, 1938 and is now being held in detention at the detention station at San Pedro, California, in the custody of the said Walter E. Carr, for which reason, the said Ong Guey Foon is unable to verify this petition, so your petitioner as his brother therefore verifies this petition in behalf of the said applicant Ong Guey Foon.

Wherefore your petitioner prays that a writ of habeas corpus be issued and directed to aforesaid District Director of Immigration and Naturalization Walter E. Carr as respondent herein, commanding him to hold the body of the said Ong Guey Foon within the jurisdiction of this Honorable Court and to present the said body before this Court at a time and place to be specified in the said Order, together with the time and cause of his detention, so that the same may be inquired into to the end that the said Ong Guey Foon may be restored to his liberty and go hence without day.

[5]

Dated at Los Angeles, California, this 30th day of September, 1939.

(Signed) Y. C. HONG,

Attorney for Petitioner

State of California
County of Los Angeles.—ss.

Ong Guey Bet, being duly sworn, deposes and states: That he is the petitioner named in the foregoing petition for a writ of habeas corpus; that the same has been read and explained to him and that he knows the contents thereof which is true of his own knowledge except those matters which are therein stated on information and belief, and as to such matters, he believes the same to be true.

(Chinese Signature)
(Sgd) (ONG GUEY BET)
Petitioner

Subscribed and sworn to before me this 30th day of September, 1939.

(Sgd) Y. C. HONG
Notary Public.

Los Angeles, California
October 2nd, 1939.

Let the writ issue as prayed for returnable before U. S. District Judge, Geo. Cosgrave on the 16th day of Oct. 1939 at 10 o'clock in the forenoon.

(Sgd) GEO. COSGRAVE
U. S. District Judge.

[Endorsed]: Received copy of the within Petition this 2nd day of October, 1939. Walter E. Carr.

[Endorsed]: Filed Oct. 2, 1939. [6]

United States District Court Central Division, Southern District of California.

HABEAS CORPUS.

The President of the United States of America

To Walter E. Carr, District Director of Immigration and Naturalization, Greeting:

You are hereby commanded, that the body of Ong Guey Foon by you restrained of his liberty, as it is said detained by whatsoever names the said Ong Guey Foon may be detained, together with the day and cause of being taken and detained, you have before the Honorable George Cosgrave, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles, at 10:00 o'clock a. m., on the 16th day of October, 1939, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable George Cosgrave United States District Judge at Los Angeles, California, this 2nd day of October, A. D. 1939.

R. S. ZIMMERMAN

Clerk.

By J. M. HORN

Deputy Clerk.

[Endorsed]: Filed Oct. 16, 1939. [8]

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS.

I, Walter E. Carr, District Director of U. S. Immigration and Naturalization Service, Los Angeles, California District No. 20, Respondent herein, for my Return to Writ of Habeas Corpus issued herein and in compliance with the said Writ of Habeas Corpus, now produce the body of Ong Guey Foon on this 16th day of October, 1939 before this Honorable Court and for my Return to said Writ deny that I am unlawfully imprisoning and detaining and confining and restraining the liberty of the aforesaid Ong Guey Foon.

For further Return to said Writ Respondent admits that the said Ong Guey Foon arrived from China at the Port of San Pedro, California the 20th day of November, 1938 on the SS "President Coolidge" and made application for admission into the United States, and certifies that the true cause of said Ong Guey Foon's detention is the finding and order of a duly and regularly constituted Board of Special Inquiry denying him admission into the United States made May 31, 1939, and the order of the Department of Labor, Washington, D. C., made on or about September 30, 1939 confirming the decision of the said Board of Special Inquiry and ordering the return of said Ong Guey Foon to the country whence he came; that Respondent was preparing to return the said Ong Guey Foon to the country whence he came when this Writ of Habeas Corpus was issued.

For further Return Respondent makes a part hereof the Department of Labor certified record containing transcript of the testimony and summary and findings of the Board of Special Inquiry, San Pedro, California, and summary and findings of the Board of Review, Washington, D. C., and [9] also certain U. S. Immigration and Naturalization Service records, identified by files numbers 9599/90, 12017/14907, 16048/5-1, 19938/3-7, 22403/6-5, 29160/6-1, 30348/5-10, 32104/6-15, 35612/14-21 and 37387/8-20 (San Francisco), and 7402/637 and 14036/133-B (San Pedro), and Exhibits "A" to "G", inclusive.

Respectfully submitted,

WALTER E. CARR,

District Director of U. S. Immigration and Naturalization Service, Los Angeles, California, District No. 20, Respondent.

[Endorsed]: Filed Oct. 16, 1939. [10]

[Title of District Court and Cause.]

TRAVERSE TO RETURN.

To the Honorable United States District Judge, now presiding in the United States District Court, in and for the Southern District of California, Central Division,

Your Petitioner by way of traverse to the Respondent's Return herein respectfully alleges:

That he realleges and incorporates herein each and every allegation contained in his Petition verified the 2nd day of October, 1939; and

Wherefore, it is again respectfully submitted that the Writ should be sustained and Ong Guey Foon be discharged from the custody of the Respondent.

Dated at Los Angeles, California, this 17th day of October, 1939.

(Sgd) Y. C. HONG
Attorney for Petitioner. [12]

United States of America

State of California
County of Los Angeles.—ss.

Ong Guey Bet, being duly sworn, deposes and states that he is the petitioner in the foregoing traverse; that same has been read and explained to him and that he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters, he believes, it to be true.

(Chinese Signature)
(Sgd) ONG GUEY BET
Petitioner.

Subscribed and sworn to before me this 17th day of October, 1939.

(Sgd) Y. C. HONG
Notary Public

[Endorsed]: Received copy of the within Traverse this 17th day of October, 1939. Walter E. Carr, Respondent, By Albert Del Guercio. Received copy of the within Traverse to Return this 17 day of Oct. 1939. Ben Harrison, U. S. Atty. by William F. Hall, Asst. U. S. Atty., Respondent.

[Endorsed]: Filed Oct. 17, 1939. [13]

District Court of the United States, Southern District of California, Central Division.

No. 14088-C. Crim.

In the Matter of

ONG GUEY FOON

On Petition for Writ of Habeas Corpus.

MEMORANDUM OF ORDER.

Cosgrave, District Judge.

The immigrant in whose behalf petitioner has petitioned for writ of habeas corpus very plainly has had a fair trial in that no opportunity has been denied him to present evidence in his behalf. The action of the Board of Special Inquiry cannot be considered arbitrary or unreasonable, except that on the same evidence they might have come to the opposite conclusion, finding the immigrant entitled to admission. Notwithstanding the clear and forcible presentation made in behalf of the petition for the

writ, and the possibility that the Court might readily reach an opposite conclusion, the Court deems itself bound by the decision of the Department of Labor. Quon Quon Poy vs. Johnson, 273 U. S. 352; Weedin vs. Yee Wing Soon, 48 Fed. (2d) 36.

The petition for writ of habeas corpus must therefore be denied, and it is so ordered.

January 19, 1940.

[Endorsed]: Filed Jan. 19, 1940. [15]

At a stated term, to wit: The September Term, A. D. 1939, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 19th day of January in the year of our Lord one thousand nine hundred and *thirty-forty.*

Present:

The Honorable George Cosgrave, District Judge.

[Title of Cause.]

This matter having come before the Court on October 10, 1939, for hearing on return to Writ of Habeas Corpus, and having been submitted on briefs to be filed 30x30x10, and the said briefs having been filed and duly considered by the Court,

the Court now files its Memorandum of Order; and, pursuant thereto, the Petition for Writ of Habeas Corpus is denied. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the above-entitled Court, Harry B. Blee, Assistant District Director of Immigration and Naturalization, and Benjamin Harrison, Esq., United States Attorney, Attorney for Respondent,

You and each of you will please take notice that Ong Guey Foon, the applicant in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Judgment rendered, made and entered herein on January 19, 1940, discharging the writ of habeas corpus.

January 22nd 1940, Los Angeles, California.

(Sgd) Y. C. HONG

Attorney for Petitioner.

[Endorsed]: Received copy of the within Notice of Appeal this 22 day of January, 1940. Harry B. Blee, Respondent. Copy mailed Jan. 22, 1940 to Ben Harrison, Esq., U. S. Attorney, Federal Bldg., Los Angeles, Cal. R. S. Zimmerman, Clerk, By E. L. S., Deputy Clerk.

[Endorsed]: Filed Jan. 22, 1940. [17]

[Title of District Court and Cause.]

4392776

COST BOND ON APPEAL.

Know All Men By These Presents:

That the undersigned Fidelity and Deposit Company of Maryland is held and firmly bound unto the United States of America, in the full and just sum of Two Hundred and Fifty Dollars ($250.00), to be paid to the United States of America, or their attorney, successors or assigns, to which payment, well and truly to be made, the undersigned binds himself, his heirs, executors and administrators, jointly and severally by these presents.

Sealed with his seal and dated this 24th day of January, 1940, at Los Angeles, California.

Whereas, lately in a habeas corpus proceeding in the United States District Court for the Southern District of California, Central Division, between the petitioner Ong Guey Foon and the respondent Harry B. Blee, Assistant District Director of Immigration and Naturalization with supervision over the port of San Pedro, California, as aforesaid, an order, judgment and decree was rendered by the said Court on the 19th day of January, 1940, against the said Ong Guey Foon, discharging the writ of habeas corpus and remanding the said petitioner to the custody of the respondent for deportation, and the said petitioner Ong Guey Foon thereupon on the 22nd day of January, 1940, filed his notice of appeal with the Clerk of the said Court to have the United States Circuit Court of Appeals for the

Ninth Circuit, to review and reverse the said order, judgment and decree in the aforesaid habeas corpus proceeding.

Now, the condition of the above obligation is such that if the said Ong Guey Foon shall prosecute his appeal to effect and answer all costs if he [19] fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal] By (sgd.) D. M. LADD
Attorney in Fact

Attest:
(sgd.) S. M. SMITH
Agent

State of California
County of Los Angeles.—ss.

On this 24th day of January, 1940, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared D. M. Ladd and S. M. Smith, known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney in Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Mary-

land thereto as Principal and their own names as Attorney in Fact and Agent, respectively.

[Seal] (sgd.) THERESA FITZGIBBONS
Notary Public in and for Los Angeles County, State of California.

My Commission Expires Feb. 18, 1942.

[Endorsed]: Filed Jan. 24, 1940. [20]

[Title of District Court and Cause.]

STIPULATION AND ORDER REGARDING ORIGINAL RECORDS AND FILES OF THE DEPARTMENT OF LABOR.

It is hereby stipulated and agreed by and between Y. C. Hong, Attorney for Appellant herein, and Benjamin Harrison, Attorney for the Appellee herein, that the original files and records of the Department of Labor covering the application of the above-named party, which were filed in the hearings in the above-entitled cause, may be by the Clerk of this court sent to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, as part of the appellate record, in order that the said original immigration files may be considered by the Circuit Court of Appeals for the Ninth Circuit in lieu of a certified copy of the said records and files, and that the same need not be printed.

Dated this 6th day of February, 1940, at Los Angeles, California.

Y. C. HONG
Attorney for Appellant

(sgd) BEN HARRISON
United States Attorney

By (sgd) WM. FLEET PALMER
Asst. United States Attorney
Attorneys for Appellee

On this 6th day of February, 1940.

It is so ordered.

(sgd) GEO. COSGRAVE
United States District Judge. [22]

[Title of District Court and Cause.]

STIPULATION AND ORDER IN RE PRINTING OF TRANSCRIPT OF RECORD.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, through their respective counsel, that the Clerk of the above-entitled Court, in preparing the printed transcript of record on appeal, may omit the heading of all papers filed except the citation, petition for writ of habeas corpus, and assignments of error, substituting in the place and stead thereof the phrase "Title of Court and Cause", and that the said Clerk may omit all backs of documents except the filing endorsements.

Dated this 6th day of February, 1940, at Los Angeles, California.

(sgd) Y. C. HONG
Attorney for Appellant

(sgd) BEN HARRISON
United States Attorney

By (sgd) WM. FLEET PALMER
Asst. United States Attorney
Attorneys for Appellee

It is so ordered.

February 6, 1940.

(sgd) GEO. COSGRAVE
United States District Judge.

[Endorsed]: Received copy of the within this 6th day of February 1940. Wm. Fleet Palmer, Asst. U. S. Atty.

[Endorsed]: Filed Feb. 6, 1940. [23]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF THE PARTS OF RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF.

Comes now Ong Guey Foon, the Appellant in the above-entitled matter, respectfully stating that he intends to rely upon the contentions that the specially constituted District Court erred:

I.

In holding that the appellant was accorded a fair trial by the Immigration Authorities;

II.

In holding that the Board of Special Inquiry was not arbitrary or unreasonable;

III.

In holding that it was bound by the decision of the Department of Labor notwithstanding the strong evidence in favor of the appellant;

IV.

In holding that cases of Quon Quon Poy vs. Johnson, 273 U. S. 352; and Weedin vs. Yee Wing Soon, 48 Fed. (2d) 36 are analogous to the case of the appellant;

V.

In denying the petition for a writ of habeas corpus instead of discharging the appellant from the illegal custody of the appellee.

VI.

Therefore, the appellant deems it necessary and hereby requests that the briefs and arguments submitted on behalf of the appellant (petitioner below) and the brief filed by the appellee (respondent below) as well as all the [25] original immigration records and files constituting the exhibit submitted to the District Court below should be made exhibits before the Circuit Court of Appeals for the Ninth

Circuit of the United States by filing the same with the Clerk of the said appellate court in accordance with the stipulations adapted by and between the parties herein on February 6th, 1940.

Dated this 6th day of February, 1940, at Los Angeles, California.

Y. C. HONG
Attorney for Petitioner and Appellant.

[Endorsed]: Received copy of the within this 6th day of February 1940. Wm. Fleet Palmer, Asst. U. S. Atty.

[Endorsed]: Filed Feb. 6, 1940. [26]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL.

To the Clerk of the said court:

Please prepare and duly authenticate the transcript of the following portions of the record in the above entitled case for appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petitioner for Writ of Habeas Corpus and Order granting writ;
2. Writ of Habeas Corpus;
3. Return to writ of Habeas Corpus;
4. Traverse to Return;
5. Memorandum of District Court Order discharging writ;

6. Notice of Appeal;
7. Cost Bond on Appeal;
8. Stipulation and Order Regarding Original Records and Files of the Department of Labor;
9. Stipulation and Order In re Printing of Transcript of Record;
10. Statement of Points on Which Appellant Intends to Rely and Designation of the Parts of Record which Appellant Thinks Necessary for the Consideration Thereof.
11. Designation of Record on Appeal.

February 7th, 1940

Y. C. HONG
Attorney for Petitioner and Appellant

Approved:

(sgd) HARRY BLEE
Asst. District Director of Immigration
Respondent-Appellee.

(sgd) BEN HARRISON
U. S. Attorney

(sgd) RUSELL R. LAMBEAU
Asst. U. S. Attorney.

[Endorsed]: Filed Feb. 7, 1940. [28]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages,

numbered from 1 to 29, inclusive, contain full, true and correct copies of Petition for Writ of Habeas Corpus; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Traverse to Return; Memorandum of Order; Minute Order January 19, 1940; Notice of Appeal; Cost Bond on Appeal; Stipulation and Order regarding original records and files of the Department of Labor; Stipulation and Order in re printing of transcript of record; Statement of Points on which Appellant intends to rely, and Designation of Record on Appeal, which together with original Immigration Records and Exhibits transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to $3.05, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 16th day of February, A. D. 1940.

[Seal] R. S. ZIMMERMAN,
Clerk
By EDMUND L. SMITH
Deputy Clerk.

[Endorsed]: No. 9451. United States Circuit Court of Appeals for the Ninth Circuit. Ong Guey Foon, Appellant, vs. Harry B. Blee, Assistant Director of Immigration and Naturalization, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 17, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9451.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONG GUEY FOON,

Appellant,

vs.

HARRY B. BLEE, Assistant District Director of Immigration and Naturalization,

Appellee.

BRIEF FOR APPELLANT.

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Parker & Baird Company, Law Printers, Los Angeles.

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No. 9451.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONG GUEY FOON,

Appellant,

vs.

HARRY B. BLEE, Assistant District Director of Immigration and Naturalization,

Appellee.

BRIEF FOR APPELLANT.

The Pleadings.

Under the provisions of Title 28 U. S. C. Sections 453-4, Ong Guey Bet on September 20th, 1939, filed a petition for a writ of habeas corpus with the District Court in and for the Southern District of California, Central Division, in behalf of his brother Ong Guey Foon, the appellant in this proceeding, setting forth therein certain allegations as to the American birth and citizenship of their father Ong You, the relationship of father and son between the said Ong You and the appellant, and the unfairness of the Immigration Authorities in the hearings accorded the appellant [Tr. of R. pp. 1-8]. The writ was issued and made returnable before that court on October 16th, 1939 [Tr. of R. pp. 8-9] on which date, the appellee filed a return to the writ [Tr. of R. pp. 10-11] in the nature of

a general denial. Thereafter, a traverse to the return was made incorporating therein all the allegations contained in the petition [Tr. of R. pp. 11-13] and issue was thus joined.

On January 19th, 1940, the District Court dismissed the writ [Tr. of R. pp. 13-15] and promptly thereafter, notice of appeal [Tr. of R. p. 15], cost bond [Tr. of R. pp. 16-18], and a statement of the points on which the appellant intends to rely for the appeal [Tr. of R. pp. 18-19] were duly made, served and filed. This appeal comes before this Honorable Circuit Court of Appeals under the provisions of Title 28 U. S. C., Section 563, paragraph (a).

Statement of Facts.

The appellant, Ong Guey Foon, came to San Pedro, California, ex SS. "President Coolidge" on November 20, 1938 and sought admission as a citizen on the ground that he was the lawful blood son of one Ong You, a native born citizen. The American birth and citizenship of the said Ong You were conceded by the Immigration Authorities and were matters of official record indicating that Ong You was born in San Francisco in 1875 and made a trip to China, departing from the United States in 1880 and returning in 1897, when he was readmitted by the San Francisco Immigration Officials as a native born citizen. During this period of 17 years of residence in China, he married and begot four sons. Appellant asserted that he was one of these sons. In 1915, Ong Guey Bet, one of the older sons, came over to America and was duly admitted by the Immigration Authorities at San Francisco as a natural born citizen, and later in 1917, another son, Ong

Guey Chuck, came over to America but he was rejected because he failed to prove satisfactorily his relationship to Ong You. Since Ong Guey Bet's admission in 1915 he made a trip back to China, departing in 1921 and returning in 1923 when he was again admitted as a citizen. In all the aforesaid immigration proceedings, the name of the appellant, Ong Guey Foon, was repeatedly mentioned as one of the blood sons of Ong You by the father, brothers and corroborating witnesses. When the appellant arrived at San Pedro last year, Ong Guey Bet, being the appellant's prior landed blood brother appeared before the Board of Special Inquiry as the principal witness due to their father's (Ong You's) death in Stockton in 1922. Mrs. Quan Shee, wife of a local Chinese merchant appeared as a supporting witness.

In addition to the testimony of the appellant and his two witnesses, the following immigration records in which the appellant was consistently mentioned as Ong You's son were obtained by the Board of Special Inquiry to check the appellant's claim, viz: (1) San Francisco Immigration Record No. 9599/90 covering the appellant's father Ong You; (2) San Francisco Immigration Record No. 22403/6-5 covering appellant's brother Ong Guey Bet; (3) San Francisco Immigration Record No. 16048/5-1 covering the appellant's brother Ong Guey Chuck; (4) San Francisco Immigration Record No. 12017/14907 covering the appellant's paternal uncle Ong Lok; (5) San Francisco Immigration Record No. 19938/3-7 covering the appellant's cousin Ong Ngooey Lin; (6) San Francisco Immigration Record No. 37387/8-20 covering the appellant's cousin Ong Ngooey Gim; (7) San Francisco Immigration Record No. 29160/6-1 covering appellant's cousin Ang

Ngooi Sin; (8) San Francisco Immigration Record No. 30348/5-10 covering appellant's cousin Ong Nguey Seak; (9) San Francisco Immigration Record No. 35612/14-21 and San Pedro Immigration Record No. 7402/637 covering the appellant's cousin Ang Nguey Yuey. These records were made exhibits in the proceeding at the court below and are available for review by this Honorable Court.

The appellant and his witnesses were questioned and cross-examined by the Board of Special Inquiry in great detail concerning his family, home, village, the surrounding country, relatives, neighbors and their families, schooling, occupation, domestic correspondence, *et cetera,* making up a transcript of hearing of some 36 closely typed, single-spaced pages of testimony by the Immigration Board. Their statements were then checked with the above-mentioned related immigration records. How comprehensive was this hearing can only be appreciated by reviewing the Board of Special Inquiry minutes, San Pedro No. 14036/1437-A dated January 6, 1938, one of the exhibits herein. At the conclusion of the hearing, the board denied the appellant admission on three alleged grounds, to-wit: (1) the appellant testified that there were 15 dwelling houses and 1 lantern house in his home village in China in 1939 while his prior landed brother's (Ong Guey Bet's) *1915* testimony showed there were only 12 houses; (2) the appellant was unable to give the correct dates and the chronological order of births of all the children of his five married cousins or the grandchildren of his paternal uncle Ong Lok; and (3) the appellant was unable to positively identify *one* of the *1915* photographs of his brother, Ong Guey Bet and the *1917* photograph of Ong Guey Chuck. The chairman of the board also thought adversely of ap-

pellant's claim because the latter had a "marked resemblance" with his brother Ong Guey Chuck who was denied admission in 1917.

The excluding order was thereupon appealed to the Secretary of Labor, and on March 1, 1939, Roger O'Donnell, Esq., of Washington, D. C., filed a brief on behalf of the appellant before the Secretary's Board of Review. The appellate board, however, sent the record back to the trial board on April 28, 1939, to check the chairman's comment on the appellant's "remarkable resemblance" to his previously excluded brother, Ong Guey Chuck. The Board of Special Inquiry theerupon had photographs of the appellant taken, and on May 3, 1939, reopened the hearing by calling one of their fellow-officers, Inspector Raymond M. Tong, who testified that the appellant and his brother Ong Guey Chuck were one and the same person and the question of identity was promptly made an additional ground in the excluding order. All this was done without notice to the appellant's attorney until the case was closed. Counsel upon learning this, insisted that an opportunity be given to seek scientific assistance in the matter of identification. Mr. John L. Harris, a well-known identification expert of this city was then requested to examine the various photographs used by the trial board in connection with its investigation as to the appellant's identity and to copy these photographs and also to enlarge them for the purpose of comparison. Finally, on May 31, 1939, the case was reopened to take the testimony of Harris concerning his research and findings in which he pointed out scientifically

that the appellant and his brother Ong Guey Chuck were entirely different persons. The testimony of Harris, his written findings, and his demonstrating photographic exhibits were made exhibits therein and are available for the inspection of this Honorable Court. The trial board excluded the appellant anyway. The adverse ruling was again appealed to the Secretary of Labor who after a delay of almost four months finally confirmed the excluding decision on September 27, 1939.

An application for a writ of habeas corpus was thereupon made by appellant's brother Ong Guey Bet to the court below on the ground that the appellant was denied a full and fair hearing by the Immigration Authorities praying for the discharge of the appellant from the illegal custody of the appellee. The court below, however, denied the application and this is an appeal from that ruling.

Specifications of Error.

The court below held that the appellant was given a fair trial principally because no opportunity was denied him to present evidence in his behalf, and that notwithstanding the clear and forcible presentation made in his favor and that the Immigration Authorities on the evidence submitted could have come to the opposite conclusion by finding that the appellant was entitled to admission, and that although the court itself likewise on the said evidence might have readily reached the same conclusion, it felt nevertheless bound by the adverse decision of the administrative boards [Tr. of R. pp. 13-15]. This conclusion is, of course, erroneous [see Statement of Points, Tr. of R. pp. 20-21].

ARGUMENT.

I.

The First Hearing Accorded by the Immigration Authorities Was Unfair Because the Alleged Testimonial Discrepancies Did Not Afford Substantial Ground for Rejecting the Affirmative Evidence Adduced in Behalf of the Appellant.

The appellant and his two witnesses were given a most searching examination on matters directly and indirectly connected with the question of relationship of father and son between the deceased Ong You and the appellant. Some 412 questions were asked by the chairman of the Board of Special Inquiry in the first hearing. The answers to these questions were checked for accuracy with no less than 9 different immigration records of his various paternal relatives who had come to the United States from his home village in China. Out of this great maze of questions and cross-questions, the chairman of the trial board was able to develop *only two testimonial discrepancies which were easily explainable,* but he nonchalantly waved all these aside and said: "the supporting evidence is very meager, the alleged brother Ong Guey Bet being the only alleged blood relative to appear on applicant's behalf". Certainly, appellee cannot deny that the previously recorded testimony of the appellant's many paternal relatives does have great probative value in this connection; *Lui Tse Chew v. Nagle,* 15 Fed. (2d) 636, 637; *Yee Chun v. Nagle,* 35 Fed. (2d) 839, 840; and *Chung Pig Tin v. Nagle,* 45 Fed. (2d) 636. The only immediate "blood relative" living in the United States was the appellant's brother Ong Guey Bet because his father Ong You is dead and his other brother Ong Guey Chuck did not gain admission in 1917.

This Honorable Court is no doubt familiar with the customary line of examination accorded by the Immigration Authorities in such cases. The appellant's family, relatives, home, domestic life, neighbors, schooling, occupation, physical characteristics of the home village, surrounding countryside, nearby markets and cities, social and religious events concerning the family, and a multitude of collateral matters which might have the slightest bearing on the issue of relationship were thoroughly gone into. As the minutes of the examination are available in the exhibits hereof (San Pedro Board of Special Inquiry Hearing No. 14036/1437-A), it would be an unnecessary tax on the time and energy of this Honorable Court to recite the testimony at this time, but it is suffice to say that there was harmonious agreement between the appellant and his witnesses as well as between his present testimony with those previously given by his father and relatives with probably two exceptions, which will be discussed presently.

The first of the two alleged testimonial discrepancy urged by the chairman of the trial board had reference to the number of houses in the appellant's home village in China. Specifically, the appellant described the said village as consisting of *15* dwelling houses and a lantern house (or school house). He recalled that, about the year 1917, his paternal uncle, Ong Lok, built a house there, and that at about the same time a new lantern house was also built, since which time he could recall of no further change in the village. His brother Ong Guey Bet on the other hand, stated his recollection of the village as it appeared prior to *1915* when he left there and came to this country to join his father. Ong Guey Bet also stated that when he returned to China in 1921, he could only recall the construction of a new

school or lantern house. The 1915 testimony of this witness showed that there were only *12* dwelling houses in the village. Some *24* years have intervened between 1915 and 1939, and this so-called discrepancy clearly reflects only the inevitable changes in any similar villages after nearly a quarter of a century, and, as recognized in the case of *U. S. ex rel. Noon v. Day,* 44 Fed. (2d) 239, is in no wise extraordinary. The court in that case said:

> "* * * The town from which relator comes has a population of about 3000 and within the years that have elapsed since Low Ging was there many changes would naturally take place. The oldest inhabitant of 1896, or indeed of 1917, has probably long since been gathered to his father's patriarches, even as other distinguished persons, hold their pre-eminence but for a short time. Furthermore, persons in China, the same as elsewhere, sometimes change their places of residence. Hence, it is not strange that relator's school teacher no longer lives but four doors distant from the old home of his parents. Again, a fishpond of yesteryear may have been drained, or become dry land with the passage of time. Then, too, men die in China, and sometimes they migrate to the Strait Settlements, and elsewhere, and this may account for some of the discrepancies which here seem to exist. Also, oldtime neighborhoods lose their identities as time goes on, and a later generation knows them not. *To understand all this one has only to recall his own experience with men, time, and events, and such experiences should teach us not to rely too strongly upon the static quality of anything. Indeed, the discrepancies which have been used to bring about the order excluding relator from admission to this country may, I think, be explained by the constantly changing order of life and events as they are everywhere*

experienced, and in my opinion the Board of Special Inquiry was at fault in failing to give proper thought to this consideration." (Italics ours.)

But the chairman of the trial board would have the reader of his "summary" believe that there was no other evidence of record to determine whether or not the appellant's description of the villlage was accurate. THIS IS UNTRUE, as the related records will show. When appellant's cousin Ong Ngooey Sin was an applicant for admission at San Francisco in June, 1920, *no less than 5 paternal relatives* of the appellant testified that there were *15* dwelling houses and a school house in that village; see testimony in San Francisco Immigration Record No. 29160/6-1. His said cousin's testimony at that time showed that there were *15* dwelling houses and one school house, and Sin's father Ong Lok (appellant's paternal uncle) and another son of his, Ong Ngooey Sic (another cousin of appellant) likewise testified at Sacramento on June 14th, 1920. Then Ong Ngooey Kim and Ong Ngooey Yuen, two other cousins of the appellant or brothers of Ong Ngooey Sin also testified at Benson, Arizona, on July 28, 1920, that there were *15-16 buildings* in that village. Again referring to the appellant's cousin Ong Ngooey Lin's San Francisco Immigration Record No. 19938/3-7, and considering the *testimony made in 1910 at San Francisco by Lin and another cousin Ong Ngooey Gim and appellant's uncle Ong Lok with their 1920 testimony, one will actually receive a out and out demonstration that the village had grown, in the interim, from a 12 house to a 15 house settlement.* Like testimony respecting the number of houses in that village in the year 1919 was given by appellant's cousins, Ong Ngooey Yuey, Ong Ngooey Seak and Ong Guey Gim and

appellant's uncle Ong Lok (see board minutes in San Francisco Immigration Records Nos. 35612/14-21 and 30348/5-10). Therefore, it requires very little persuasion to see that an excluding order on such a "ground" urged by the trial board's chairman is ARBITRARY and UNFAIR.

As to the second alleged discrepancy, the closing sentence of the paragraph of the "summary" in question shows that it was *no discrepancy at all* because the chairman readily admitted that the appellant had corrected what appeared to have been a *mere misunderstanding due to the almost similarity in the pronunciation of the last names of his two cousins, Ong Ngoocy Lim and Ong Ngooey Gim,* but he was nevertheless unwilling to go back into the record and to correct the misunderstanding as to which, of the families of these two cousins, was which. The appellant was required to answer questions after questions in the most minute detail with reference to the 7 children of his uncle Ong Lok as well as the uncle himself, and 5 of these children of his uncle were married adults, and they in turn have about 20 children altogether, most of whom were born and have lived in the village for the past 19 years. The appellant was in business and employed in the Woo Lung Market during all of this time, making trips every now and then back to his home to see his own family. He frankly admitted that he could not recall the time and chronological order of birth of most of these children. However, when it is conclusively shown and it was freely admitted by the chairman that there was a misunderstanding, *ordinary fairness and ordinary efficiency should have required the trial officer to correct any further error or misunderstanding* dependent upon the principal one. That he did not do so is but an indication that the Board

of Special Inquiry was only vigilant in developing discrepancies to support its excluding order and slept upon the appellant's rights—the right of any citizen to a full, fair and complete hearing of his case. In the case of *Lum Hoy Kee v. Johnson,* 281 Fed. 872, the court said:

> "As I have before observed, in cases tried in such a summary manner and under such conditions so difficult for the applicant for admission as cases of this sort, *a heavy burden is put on the immigration tribunals to protect the rights of the applicant as well as those of the government".* (Italics ours.)

In addition to these 2 discrepancies, the chairman of the trial board urged as a third "ground" for the excluding decision on the appellant's failure to identify certain photographs in the immigration records. One of them was the photograph of his brother Ong Guey Bet taken in *1921* and attached to the original Form 430 certificate issued that year. The chairman, however, did not report in his "summary" that when this Form 430 certificate was issued to Ong Guey Bet in 1921, some careless officer casually stamped directly across the face of it the stereotyped information regarding the date, steamer, etc., when he departed from this country. Suppose that the appellant had misidentified this partially mutilated and defaced photograph, why did not the chairman or the other members of the trial board show the appellant the other photographs of Ong Guey Bet contained in his 1915 record? Why use a photograph at all? Ong Guey Bet was before the board in person, so why was not the appellant permitted to identify him, if he could, in person? The other photograph that the appellant failed to identify was a picture of his brother Ong Guey Chuck who was denied admission

at San Francisco in *1917*. This is a typical "passport picture" of the like of which this Honorable Court in a similar situation in *Louie Poy Hok v. Nagle,* 48 Fed. (2d) 753, said: "Failure to recognize the photograph is not to be considered as proof that the claimed relationship does not exist". *The evidence of record shows that the appellant has not seen this brother for nearly 16 years.* It should be noted that the chairman commented that there is a "marked resemblance" between the appellant and this photograph, and *in a subsequent hearing held that the appellant and this Ong Guey Chuck constituted one and the same person,* the absurdity of which claim is immediately apparent. The chairman did not give the appellant an opportunity to identify the photographs of his father Ong You and *misstated* in his "summary" that "The Board had *no* photographs of the alleged father" (last sentence of first paragraph on page 40 of board minutes). *There are several photographs of the appellant's father Ong You in San Francisco Immigration Record No. 22403/6-5 covering appellant's brother Ong Guey Bet and in San Francisco Immigration Record No. 16048/5-1 covering his brother Ong Guey Chuck.* Furthermore, the chairman for some unknown reason, did not report the remaining portion of the evidence on record respecting the appellant's ability to recognize the photographs of his other relatives! When shown the photograph of his cousin Ong Ngooey Gim which has been reposing in the immigration records since 1927, the photograph of his cousin Ong Ngooey Yuey which has been reposing in the immigration records since 1934, and the photograph of his cousin Ong Ngooey Sik which has been kept in the immigration records since 1929, the appellant correctly identified each and every one of them. There were still many other photographs of his relatives avail-

able for identification in the immigration files but the *chairman,* at this point, apparently seemd to have deemed it wise to show the appellant no more photographs of his paternal relatives, and *failed to even mention, much less reported, the appellant's accurate identification of those shown him.* Our Supreme Court held in *Kwock Jan Fat v. White,* 253 U. S. 454, 40 S. Ct. 566, that

> "It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a *full record is preserved of the essentials* on which the executive officers proceed to judgment". (Italics ours.)

In *Gambroulis v. Nash,* 12 Fed. (2d) 49, 52, it was held that "The Courts will not review the findings of the Department of Labor on the fact question involved, *if there is substantial evidence to support it",* and therefore, "Whether there is any substantial evidence presented at the hearing to support the charge is a *question of law, reviewable by the Court".* (See also *Whitfield v. Hanges,* 222 Fed. 754, 138 C. C. A. 199; *U. S. ex rel. Berman v. Curran,* 13 Fed. (2d) 96; and *Ex parte Chung Thet Poy,* 13 Fed. (2d) 262.) This Honorable Court held in *Nagle v. Dong Ming,* 26 Fed. (2d) 438, that "it must be borne in mind that mere discrepancy does not necessarily discredit testimony". Our Supreme Court requires that there must be sustantial evidence to base an order of exclusion; *Ng Fung Ho v. White,* 259 U. S. 276, 42 S. Ct. 494; *Tang Tun v. Edsell,* 223 U. S. 673, 32 S. Ct. 359; and *United States v. Ju Toy,* 198 U. S. 253, 25 S. Ct. 644, and admonishes that *although Congress has given great powers*

to the immigration officials over Chinese immigrants as well as citizens of Chinese descent, this power should be exercised, not arbitrarily but fairly and openly, under the restraint of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin, creed or race; Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566.

It is, of course, easier for the immigration officers to dispose of cases by short cuts without clear legal grounds or evidence but it was held in the case of *Mason ex rel. Lee Wing You v. Tillinghast, 27* Fed. (2d) 580, 581, as follows:

> "We assume that these tribunals are not bound by the rules of evidence applicable to a jury trial. But *they are bound by the rules of reason and logic—by what is commonly referred to as common sense.* Compare Commonwealth v. Jeffrie, 7 Allen (Mass.) 548, 563, 83 Am. Dec. 712; State v. Lapage, 57 N. H. 288, 24 Am. Rep. 69; 1 Wigmore Evidence, Secs. 12, 13, 34.
>
> "* * * but this cannot be said of every discrepancy that may arise. We do not observe the same things, or recall them in the same way, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects.
>
> "* * * *When Congress vested in these administrative tribunals the power of determining family relationship and citizenship, it freed them from the technical methods of proof that the courts have, but not from the obligation of seeking the truth with open and reasoning minds".* (Italics ours.)

II.

The Second Hearing Accorded by the Immigration Authorities Was Unfair Because the Excluding Order Rendered Against the Appellant Was Based on Conjectures Instead of Substantial Evidence.

Apparently not satisfied that the aforesaid "grounds" were sufficient to sustain an order for the appellant's exclusion, the appellate board ordered an investigation of the trial board chairman's comment on the question of identity between the appellant and his previously excluded brother Ong Guey Chuck. On May 3, 1939, Immigration Officer Raymond M. Tong appeared before the Board of Special Inquiry and testified that after looking over the *1917 photograph of Ong Guey Chuck* and comparing it with a photograph of the appellant taken by the immigration inspectors at San Pedro and the appellant in person, he came to the conclusion that they were one and the same person. The 1917 photograph of Ong Guey Chuck was a front facial view of a *16 or 17 year old boy* while the appellant's photograph was that of a *middle-aged man* of 43 years old. The gist of Inspector Tong's opinion was his answer to question No. 428 as follows:

> "I would say after examining Ex. 'D' (1939 photograph of appellant) and the photograph contained in San Francisco file 16048/5-1 (1917 photograph of Ong Guey Chuck), that they represented the same person. In viewing the photograph contained in the San Francisco file thru the magnifying glass, it can be seen that the formation of the ears are identical with that on Ex. 'D'; the formation of the nose is similar; the large lips, position of the eyes are in my opinion identical and it is noted that there is a scar on both Ex. 'D' and the photo-

graph contained in the San Francisco file, at the outer corner, left side of the mouth in exactly the same position. Ex. 'D' is undoubtedly a photograph of the person before the Board. *There appears to be a scar below the outer corner of the right eye on the cheekbone on the photograph in San Francisco file 16048/5-1, which is not obvious on the person now before the Board* although there appears to be several small indentations in the same position as the scar shown on the photographs in San Francisco file". (Italics ours.)

On the above testimony, the trial board decided that the appellant was not himself, but was in fact, his brother Ong Guey Chuck, and again excluded him, overlooking entirely the one and only issue in the case, to-wit: whether or not the appellant was the blood son of his American born father Ong You. Inspector Tong's testimony may be liken to the following illustration used by Professor John H. Wigmore in his treatise on "Generic Human Traits" (page 333, The Principles of Judicial Proof, 2nd Edition). An eminent Queen's counsel spoke about the quickness with which a certain witness arrived at a conclusion, of a case that occurred some years ago in England. A woman who had cohabited with a tradesman in a country village suddenly disappeared. Her paramour gave out that she had gone to America. Some years after a skeleton was found in the garden of the house where she had lived. On examination by a medical man he at once pronounced it to be that of the missing woman. He formed this opinion from the circumstances that one of the teeth was gone, and that he had extracted the corresponding one from the woman some years before. Upon this the prosecution was instituted, and the man was com-

mitted for trial to the assizes. Fortunately, there was time before the trial came on for a further investigation of the garden where the skeleton was found, and on digging near the spot another skeleton was discovered, and then another, and another; then several more. This threw some doubt upon the identification of the bones in question, and on further inquiries being made it turned out that the garden had once been a gypsy burial ground. It need scarcely be added that the prosecution, which had been vigorously taken up by the government, was at once vigorously abandoned.

On the insistence of the appellant's counsel, John L. Harris, an identification expert and examiner of questioned documents was finally granted the privileges of copying the 1917 photograph of Ong Guey Chuck and of making prints from the negative for Exhibit "D" (1939 photograph of appellant taken by Inspector Howard Day). In order to make a systematic comparison of these two photographs, Harris made an enlargement of the 1917 photograph of Ong Guey Chuck maintaining the comparable features of the subject thereof approximately the same size with those of the appellant's 1939 photograph or the so-called Exhibit "D", and then superimposed one photograph over the other (Exhibits "F-1" and "F-2"). The superimposed photograph of Ong Guey Chuck, was then cut in such a manner so as to allow the lifting of portions thereof for direct and immediate comparison with the corresponding features of the appellant underneath. The value of this scientific method of direct comparison can readily be appreciated by any fair minded person because the comparable features of one photograph are of virtually precise and identical in size as the

same features in the other, so that if the two persons are identical, each feature of the face should check against the other without noticeable difference. Harris also compared the appellant's person and facial features with those revealed in the 1917 photograph of Ong Nguey Chuck. On May 31, 1939, Harris made the following findings:

"You are advised the following information together with results of my examination of certain photographs for the purpose of determining whether one Ong Guey Foon is the same or a different individual than Ong Guey Chuck.

"My qualifications for examining and comparing photographs is based upon over twenty years' experience in identification work. I maintain a laboratory with complete photographic equipment devoted to identification work involving questioned documents and other unusual problems of an identification nature with reference to photography. As an identification expert, I have upon many occasions examined exhibits for different departments of the Government and testified in the Federal Courts.

"*The photograph of Ong Guey Chuck is not a suitable one for identification purposes. Much of the detail in the face is concealed by shadows. It is conceded in police identification practice that two photographs are required; one profile view and a front view of the face. The photograph of Ong Guey Chuck does not allow for an examination of the ears or the profile of the face.* On the photograph of Ong Guey Foon there appears many facial scars. These are on the chin, above the upper lip, one to the right of the mouth on the cheek, and one to the left of the mouth on the cheek, and a large scar on the bridge of the nose.

"On the photograph of Ong Guey Chuck there is one small scar to the left and slightly above the corner of the mouth and probably another scar on the right cheek slightly higher and further from the corner of the mouth than the scar on the left cheek. It is possible, although I am not certain, that a scar exists on the upper left center of the lip. *I do not identify any scars on the photograph of Ong Guey Chuck on the forehead near the hairline or on the bridge of nose.*

"It is my opinion that while the photographs of Ong Guey Foon and Ong Guey Chuck may *show some similar general facial features,* these may be *due to family or nationality characteristics. Aside from the general characteristics there are not sufficient individual peculiarities observable in these photographs to assume that Ong Guey Foon and Ong Guey Chuck are the same person.*

"The scar on the left cheek in the photograph of Ong Guey Chuck is not of the same form or in the same position as any scar on the cheek of Ong Guey Foon. The many other scars which can be identified in the photograph of Ong Guey Foon do not appear in the photograph of Ong Guey Chuck. These scars would be the identifying characteristics but they are not identified as corresponding in both photographs.

"I have also taken into consideration that *there is a lapse of 22 years in time between the photographs of Ong Guey Chuck and Ong Guey Foon. As a whole, the evidence is vague, uncertain, and unreliable, and in my opinion, it is not reasonable to assume upon such evidence that these two photographs represent the same persons."* (Italics ours.)

These exhibits and findings were submitted to the trial board and his testimony before it was substantially the same.

Whether or not the trial board had considered these composite photographs is not known as far as the record reveals but it can be readily seen that it limited itself to very general statements, noting *only* things which appeared to them to be similar but *no note whatever was made of any apparent differences.* The trial officers *ignored the startling difference in the appearance of the lower portion of the appellant's face as compared with that of his brother Ong Guey Chuck. The appellant's chin is obviously twice as long as, and of an entirely different formation than, the corresponding features of Chuck.* It resembles more the very long and heavy chin of his father Ong You whereas Chuck's does not. But the strange thing is that, if one turns to the opinions of the board members and Immigration Officer Tong, one would assume that neither of the two subjects of the photographs had a chin or lower jaw, for not a single one of them has taken into account this great difference, so strongly depicted in Exhibit F-2. Coming now to the matter of identification marks, it is perfectly clear that the real question here is this: *If the photograph of Chuck clearly shows identifying marks, which are not apparent on the face of the appellant, it must be equally clear that they are not, and could not be, the same person.* Immigration Officer Tong in his testimony before the trial board referred to a "circular scar" to the left of Chuck's mouth and what he seemed to consider as similar scar on the appellant. But the most that the chairman could do was to say that, although the scar on the appellant "appears to be closer to the nose" he

nevertheless opined that the scars indicated on both photographs "appear to be *relatively* in the same position." Whatever he meant by *"relatively"*, the fact is that the scars are NOT in the same position, as *that of the appellant is almost on the lip, while that of Chuck is nearer the cheek.* Harris testified that *this scar was in the nature of a "small oblong depression" to the left of Chuck's mouth which could not be found on the photograph or person of the appellant.* Inspector Tong stated that there is a "scar below the outer corner of the right eye on the cheek bone" in Chuck's photograph but qualified his statement saying that this *"is not obvious"* on the person of the appellant. What he apparently meant to say, and what is in fact, is that this scar *does not exist* on the person of the appellant. Indeed, *when the Immigration boards* (trial and appellate) *held that Chuck "has no marks or scars that are not present on the applicant"* (*appellant*), *the statement was not true.* Some of the most tragic miscarriages of justice have been due to testimonial errors in identification. The process of identification certainly calls for caution and precaution. It calls for caution, in that testimonial assertions to identify must be accepted only after the most careful consideration. The risk of injustice being so serious and the great possibilities of lurking error should cause hesitation, and the investigator should seek to establish as many marks as possible that may check the testimonial assertions. The process also calls for precaution, in taking measures beforehand objectly to reduce the chances of testimonial error.

In any event the value of *using photographs alone* as a means of identification is unreliable; *Ruloff v. People,* 45 N. Y. 213. Under the Bertillon system, both the *front* and *profile* views are necessary, and even then, the French

police authorities regard their importance, in so far as they show facial expression, as only secondary. The Bertillon system is based upon four chief measurements: (1) head length, (2) head breadth, (3) middle-finger length, and (4) foot length. These measurements are believed to remain constant during *adult* life. Each of these dimensions is subdivided into three classes, small, medium and large, and the resulting eighty-one classes are filed away as primary headings for reference. Each of these primary headings is again subdivided, according to other measurements, such as the height, the span, the cubit, the height of the bust, and the length and breadth of the ear. The nose is described according to its profile. The bridge may be concave, rectilinear, or convex. The direction of the alae nasi, with reference to the pendicular of the profile, may be ascending, horizontal, or descending. The classification of the ears is determined bv the character of the outer border, the profile of the antitragus, the contour of the lobe, and the adherence of the lobe to the cheek. The color of the eyes is made the basis of seven classes. The presence of peculiar marks upon the body is also detailed, and the measurements of the head, nose, and ears are *supplemented by front and profile photographs.* There are many limitations to the Bertillon system, and one of the principal difficulties is the *system is applicable only to the adult, in which age alone the measurements are known to be constant.* That is why it had to give way in modern police practice to the fingerprint system or dactyloscopy, the proving of identity by the digital patterns because there is no more difference between the digital designs of a child who is just born, and those of the same subject at two years, five years, ten years, or twenty years,

than there is between successive enlargements of the same photographic negative, and because the physiological wear of the skin does not change in the least detail the design, which is not modified pathologically. It is therefore readily appreciated that the rather primitive and haphazard manner by which the appellant was "identified" by the Immigration expert to be the same person as his brother Ong Guey Chuck was *unscientific, arbitrary and unfair. Nothing could be more outrageous on our sense of justice than to try to establish identity by comparing a 16 year old boy's photograph with that of a 43 year old adult.*

As to the general resemblance between the appellant and Ong Guey Chuck, counsel invites another comparison, in order that the resemblance between these two brothers may not seem to be an anomoly. Compare the photograph of Ong Guey Bet on his receipt for certificate of identity dated July 16, 1915 in San Francisco Immigration Record No. 22403/6-5, with the photograph of Ong Guey Chuck of record. Such comparison indicates a strong resemblance between them, at least as good as between Chuck and the appellant. Neither Bet nor Chuck have the elongated and pronounced chin of the appellant, and their noses are more nearly identical in appearance. All three seem to resemble one another, and to bear recognizable family characteristics. This is distinctly favorable to the appellant's cause, and consistent with the claim of relationship which the appellee cannot deny. The law does not prevent Ong Guey Chuck to seek admission again one year after his exclusion in 1917. If he really cares to come over again and believes that he is in a better position to prove his right to such admissibility, he does not need to pass himself off as his brother, who in the final analysis

must likewise prove his case before he could be admitted. There was neither sense nor necessity and therefore no motive for him to assume any other role than that of his own. In any event, the one principal task that must be performed which applies to him as well as to all of his brothers is to show satisfactorily their relationship to Ong You, the American born citizen. This was adequately proved with substantial and satisfactory evidence by the appellant before the board of special inquiry at San Pedro. Ong You, during his lifetime, did consistently and repeatedly claim the appellant as his son. The affirmative evidence adduced in the hearing before the trial board conclusively proved that the appellant is a lawful and blood son of Ong You whose American nativity and citizenship were conceded by the Immigration Authorities. *The attempt of the immigration boards to thus construct a case of fraud against the appellant was certainly arbitrary as well as childish. The mere formality of giving a hearing by the immigration officers can be of no avail to the appellant if the testimony of competent witnesses and material evidence are to be entirely disregarded and the findings are to be made only in accordance with the Immigration Department's fixed policy to exclude under any kind of pretense and excuse.* The boards clearly disclosed nothing but a hostile determination to exclude, so when one's right as a citizen was examined by officers in that spirit, the hearing given him could have been anything but fair. All these warn us of the danger of tolerating a system where the officers assume the role of prosecutor, judge, jury and witness all at once, and the ordinary rules for the protection of the appellant's rights are held in abeyance.

III.

The Court Below Erred in Holding That the Hearings Accorded by the Immigration Authorities to the Appellant Were Fair Because No Opportunity Was Denied Him to Present Evidence in His Behalf and Therefore It Was Bound by the Decision Rendered.

The court below ruled erroneously when it held that the appellant "very plainly has had a fair trial in that no opportunity has been denied him to present evidence in his behalf" [Tr. of R. p. 13]. The Immigration Authorities must not only give an applicant for admission an opportunity to present evidence in his own behalf *but must also accord due and careful consideration to such evidence presented, otherwise the hearing would be nothing more than an empty gesture.* This Honorable Court held in the case of *Gung Yow v. Nagle,* 34 Fed. (2d) 848, 851, *et seq.,* as follows:

> *"The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses,* either of a fixed policy to give weight to a presumption of law far beyond legislative intent or because of a policy calculated to entrap witnesses into statements inconsistent with his own or other witnesses' statements, and then to base an order of exclusion or deportation upon such variances or discrepancies as are reasonably to be expected in all human testimony either due to lack of memory, to temporary forgetfulness, to lack of observation, or to inattention to questions, or to a failure to fully appreciate their force or significance." (Italics ours.)

The requirement in such a hearing is that there should be an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law; *Chin Yow v. United States,* 208 U. S. 8, 28 Sup. Ct. 201, L. Ed. 369. Here the immigration boards certainly did not abide by any such methods. *The officers knew nothing of the actual facts at issue but simply matched witness against witness so as to develop discrepancies and arbitrarily ignored all other affirmative evidence contained in the relating records which pointed to the truthfulness of the appellant's testimony.* This very Honorable Court held in the *Gung Yow v. Nagle* case, 34 Fed. (2d) 848, 853, that such a method used in arriving at an adverse decision is unreasonable.

It is well settled that our Courts will not interfere with the findings of the immigration authorities upon a question of fact unless the findings were arbitrarily reached or the decision is unfair or is not supported by evidence; *United States v. Ju Toy,* 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; and *Tang Sun v. Edsell,* 233 U. S. 673, 681, 682, 32 Sup. Ct. 359, 56 L. Ed. 606. It is equally settled that the decision of the immigration authorities must be after a *hearing in good faith,* however summary, *Chin Yow v. United States,* 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, *Zakonaite v. Wolf,* 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218, *Kwock Jan Fat v. White,* 253 U. S. 454, 458, 40 Sup. Ct. 566, 64 L. Ed. 1010. If the record discloses that the immigration authorities have exceeded their power, the applicant may demand his release on habeas corpus, *Geigow v. Uhl,* 239 U. S. 3, 9, 36 Sup. Ct. 661, 59 L. Ed. 1493. If discrepancies form the basis of an excluding decision, the same must be sufficient to satisfy

reasonable minds that the decision is justified, *United States ex rel Leong Ding v. Brough,* 22 Fed. (2d) 926; *Go Lun v. Nagle,* 22 Fed. (2d) 246; *Johnson v. Ng Ling Fong,* 17 Fed. (2d) 11; *Johnson v. Damon ex rel Leung Fook Yung,* 16 Fed. (2d) 65; *Ex parte Chung Thet Poy,* 13 Fed. (2d) 262, and subsequently affirmed in 16 Fed. (2d) 1018; and *Nagle v. Wong Ngook Hong et al.,* 27 Fed. (2d) 650.

It is within the province of the Court to ascertain whether or not there is any substantial evidence to support an order of exclusion; thus, in *Dan Foo v. Weedin,* 8 Fed. (2d) 221, this Honorable Court said:

> "How far the excluding decision may have been controlled by this latter consideration we do not know, but, in any event, *we find no substantial evidence in the record tending to controvert or disprove the facts set forth in the certificate.*" (Italics ours.)

In *Gambroulis v. Nash,* 12 Fed. (2d) 49, 50, our 8th Circuit Court of Appeals said:

> "As we view this case, it is reduced to one question, viz: *Was the decision of the Department of Labor based upon substantial evidence* presented at the hearing?" (Italics ours.)

In *Svarney v. United States,* 7 Fed. (2d) 515, 518, the Court said:

> "* * * Our further conclusion must therefore be that *there was no substantial evidence in the record to support the findings* in the warrant of deportation." (Italics ours.)

The Court below felt that it was bound by the decision of the immigration officers in spite of "the clear and forcible presentation made in behalf of the petition for the writ, and the possibility that the Court might readily reach an opposite conclusion," citing the cases of *Quon Quon Poy v. Johnson,* 273 U. S. 352, and *Weedin v. Yee Wing Soon,* 48 Fed. (2d) 36, for its authority [Tr. of R. pp. 13-14]. These two cases could not be applied to the instant one. In the *Quon Quon Poy* case, *supra,* the *Court declined to hear witnesses offered by the appellant for the purpose of independently establishing his citizenship* holding that an applicant for admission *who has never resided in the United States is not entitled* under the Constitution *to a judicial hearing of his claim* of his American citizenship. This was not the intention or wish of the present appellant [see petition for writ, Tr. of R. pp. 1-7]. He asked for his release by the writ on the ground that the excluding decision depriving him of his citizenship rights and privileges was not based on substantial evidence and *rested only on the affirmative evidence adduced in his favor before the immigration board of special inquiry.* That it was within the power of the Court below to review such evidence certainly requires no further argument; *Kwock Jan Fat v. White,* 253 U. S. 454, 40 Sup. Ct. 566. As to the *Weedin v. Yee Wing Soon* case, *supra, this Honorable Court did carefully review the evidence of record,* and that it however found that the discrepancies were not due to forgetfulness or mistake but on incidents which occurred less than a year before the appellee and his father were examined by the immigration authorities

and therefore the excluding was based on substantial evidence, was beside the question. It certainly does not hold that the Court is absolutely bound by the decision of the immigration boards regardless of the evidence of the record. This very Honorable Court also held in the case of *Gung Yow v. Nagle,* 34 Fed. (2d) 848, 851, that "the mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses."

In the instant case, it was plainly seen that the first hearing accorded the appellant was a mere formality of matching one witness against another for the sole purpose of developing discrepancies to base an order of exclusion without any regard to the multitude of statements previously given by the appellant's relatives which overwhelmingly confirmed the truthfulness of the appellant's testimony. The second hearing revealed that the immigration officers acted all at once as prosecutor, judge, jury and prosecution-witness, and only after the insistence of appellant's counsel, the hearing was reopened to permit the submission of scientific evidence which was ultimately disregarded by them in favor of the prosecution's haphazard conjectures and unscientific conclusions. *This unintended and reluctant concession by the immigration authorities to permit the appellant the formality of presenting evidence on his own behalf cannot by itself cure a hearing that was inherently unfair. It only gave an official color to an obvious and predetermined injustice.* The Court below certainly erred in its conception of what constitutes a fair hearing.

Conclusion.

In summarizing the arguments in behalf of the appellant, it has been clearly shown (1) that affirmative evidence adduced before the immigration boards establishes to a reasonable certainty that the appellant is an American citizen being the lawful and blood son of his father, a native born citizen of the United States, (2) that the two discrepancies developed in the first hearing were obtained by the immigration authorities through matching one witness against another in utter disregard to the actual facts previously perpetuated by the testimony of appellant's relatives in nine different official immigration records which were before the examining and reviewing officers, (3) that in connection with the matter of identification of photographs, the examining officers showed only some and withheld many pictures of record to the appellant, calling attention to only the ones that the appellant failed to recognize and suppressing the mentioning of those that he successfully identified, (4) that the conclusion drawn by the immigration officers in the second hearing to the effect that the appellant was not himself but was really one of his alleged brothers was only predicated upon absurd conjectures through comparing photographs of a 16-year-old boy with a 43-year-old man, (5) that the subsequent reopening of the second hearing at the insistence of the appellant's counsel to permit submission of scientific assistance without giving such evidence its due consideration did not cure the unfairness of the hearing, (6) that the Court below erred in believing that it was bound by a decision so

founded by the immigration authorities and that the said decision was not unfair, and (7) that rules in the cases of *Quon Quon Poy v. Johnson, supra,* and *Weedin v. Yee Wing Soon, supra,* are not applicable to nor are their facts and circumstances similar with those of the appellant's case.

It is therefore respectfully requested that the order of the Court below be *reversed* with direction to issue a writ of habeas corpus releasing the appellant from the illegal custody of the appellee.

Dated at Los Angeles, California, this 15th day of April, 1940.

Respectfully submitted,

You Chung Hong,
Attorney for Appellant.

No. 9451.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONG GUEY FOON,

Appellant,

vs.

HARRY B. BLEE, Assistant Director of Immigration and Naturalization,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Statement of the Case.

This is an appeal taken from an order of the District Court for the Southern District of California, Central Division, denying appellant's petition for writ of habeas corpus [T. 13].

The appellant, Ong Guey Foon, hereinafter called the "applicant," was born in China, and is of the Chinese race. *He is over 44 years of age and has never resided in the United States before.* On November 20, 1938, he arrived at the port of San Pedro, California, from China and sought admission to the United States as the foreign-born son of a deceased *Ong You.* The Government concedes

that the deceased Ong You was a citizen of the United States. The applicant's case was heard by a Board of Special Inquiry appointed under Section 17 of the Immigration Act of February 5, 1917 (8 U. S. C. A. 153). This Board determined that the applicant had not satisfactorily established that he was the son of the deceased Ong You and unanimously voted to exclude him from admission. The determination was upheld by the Secretary of Labor on appeal. The applicant then applied to the District Court for a writ of habeas corpus and, from an order denying the writ, has appealed to this Court.

Question at Issue.

As laid down by this Court in the case of *Mui Sam Hun v. United States,* 78 F. (2d) 612:

> "The question presented in this appeal is solely *'whether the evidence submitted on the application for admission so conclusively established the (fact in issue) that the order of exclusion should be held arbitrary or capricious. * * * The question is not whether this court, acting on the evidence submitted, might have found differently from the executive branch of the Service;* the question is whether or not the latter granted a fair hearing and (sic) abused their discretion * * *.' Jue Yim Ton v. Nagle, 48 F. (2d) 752 (C. C. A. 9). 'And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed conclusive and is not subject to review by the court.' Tang Tun v. Edsell, 223 U. S. 673, 675." (Italics ours.)

Argument.

From a review of the administrative proceeding the District Court found that the applicant "very plainly had a fair trial and had been given opportunity to present evidence in his behalf." It further found that the findings of the Board were neither arbitrary nor capricious [T. 13]. It is respectfully submitted that in so finding and holding the District Court committed no error. The findings and holding of the District Court finds ample support from the record.

But, let us examine the record to determine whether the Board manifestly abused the power conferred upon it by statute in rejecting the applicant's claim.

We find that the applicant was born in China and is of the Chinese race. Although over 44 years of age, this is the frst time the applicant has sought admission to the United States. Being a person of the Chinese race, the applicant was entitled to enter only if he satisfactorily established that he was born a citizen of the United States under the provisions of Section 1993 of the Revised Statutes. To establish his claimed citizenship it was necessary for applicant to prove that he was the legitimate son of the deceased Ong You, who concededly was a citizen of the United States. On this issue the applicant had the burden of proof:

Mui Sam Hun v. United States, supra;

Wong Tin v. Ward (C. C. A. 1), 102 F. (2d) 146;

Quon Quon Poy v. Johnson, 273 U. S. 252;

Won Yin Loon v. Carr (C. C. A. 9), 108 F. (2d) 91, 92.

On this subject the applicant offered no testimony except that of himself and his alleged brother, Ong Guey Bet. A third witness, Quan Shee, had no knowledge whatever of the claimed relationship. She merely testified she saw the applicant twice in China for a period of less than one hour each time [see Q. 237-250, Immigration Record]. No documentary proof of the claimed relationship was offered. The transcript of the testimony given before the Board of Special Inquiry is to be found in Central Office file No. 55997/570, referred to herein as the "Immigration Record." For the convenience of the Court, the Memorandum of the Board of Review, dated September 27, 1939, setting forth the grounds upon which the claimed relationship was rejected, is quoted below:

> "Before the Board of Review on APPEAL in EXCLUSION proceedings on reopening.
>
> "In behalf of APPELLANT: Attorney Roger O'Donnell submitted brief when the record was originally transmitted to the Department and has now filed a supplementary brief on reopening.
>
> "Excluded on the ground that the claimed relationship has not been established.
>
> "MOTION: That appeal be sustained on the ground that the applicant is a United States citizen, being the child of Ong You, a native-born citizen of the United States, now deceased.
>
> "The case was reopened for further consideration in accordance with instructions of April 28, 1939.
>
> "The citizenship of the alleged father, Ong You, is conceded. In prior records he has claimed four sons. One of these alleged sons, Ong Guey Bet, was admitted in 1915 and was last in China between 1921 and 1923. An alleged son, Ong Guey Chuck, applied

for admission March 30, 1917. He was rejected and his appeal withdrawn, whereupon he was deported. An alleged son of applicant's name and approximate age has been claimed in previous records. The alleged brother Ong Guey Bet and Quan Shee, an alleged acquaintance of Ong Guey Bet who was last in China in 1937 and 1938, have appeared to testify on behalf of applicant.

"On the first hearing before the Board of Special Inquiry the Board pointed to certain discrepancies concerning the number of houses in the village and the names of persons residing in certain houses in the village. The Board of Special Inquiry also pointed out that the applicant failed to identify the photographs of his alleged brother Ong Guey Bet and his alleged brother Ong Guey Chuck, who was rejected and deported. The Chairman of the Board of Special Inquiry, in his summary, stated that the supporting evidence is very meagre, the alleged brother Ong Guey Bet being the only alleged blood relative to appear on applicant's behalf. The fact that Ong Guey Bet is the only blood relative appearing in the case is an important factor, it appearing that due to his long absence from China Ong Guey Bet professes at this time to have very little knowledge concerning the home village and its surroundings. Attention is also called to the fact that when he testified in the case of his alleged brother Ong Guey Chuck, who was rejected and deported, his testimony was found to be so contradictory that the Board of Special Inquiry found it extremely unsatisfactory. In the present case he refers to the testimony then given and says that while he has no recollection of the matters inquired into at this time, what he said then was correct. It appears, therefore, that his support to the application is of little value. While he claims to be the moving

factor in bringing the applicant to the United States at this time, he testified that he never has corresponded with the applicant during the many years since he (Ong Guey Bet) left China.

"The Board of Special Inquiry, in its summary, called attention to the fact that there is a remarkable resemblance between the applicant and the photograph in the records of the rejected alleged brother Ong Guey Chuck. The Board of Review, upon examination of the photographs, found not only a remarkable resemblance, but found that the photographs of Ong Guey Chuck and the applicant are practically identical. A scar near the corner of the mouth of Ong Guey Chuck as it appears in his photograph was noted. For this reason the Board of Special Inquiry was directed to compare the applicant in person with the photograph of Ong Guey Chuck, and, if it was found that applicant has the scar appearing on the photographs of Ong Guey Chuck, the Board was authorized and directed to reopen the case for further examination. Upon examination of the applicant the Board of Special Inquiry found that he bears such a scar, whereupon the case was reopened as directed.

"In his summary submitted on reexamination, the Chairman of the Board of Special Inquiry stated that the photograph of Ong Guey Chuck shows that he had a circular scar at the outer corner of and just above his left upper lip. He noted that the applicant, ONG GUEY FOON, has a circular scar over the outer corner of his left upper lip. He states that the scar on ONG GUEY FOON'S person appears to be closer to his nose than the scar shown on the photograph of Ong Guey Chuck, but that on comparing the photograph of the applicant marked Exhibit 'D' with that of Ong Guey Chuck the scars appear to be relatively

in the same position. If they are not in identically the same position, it is doubtless due to the fact that according to the testimony of the applicant his upper lip was deformed by an accident in 1934, which drew his upper lip out of position. Upon examination of the applicant and comparison with the photograph of Ong Guey Chuck the Board of Special Inquiry found that a vertical scar starting at the hair line and going upward at the left center of the forehead is present in the photograph of Ong Guey Chuck, and that a personal examination of the applicant shows such a scar in the identical location, which scar may be seen on Exhibit 'D.' The Board of Special Inquiry also found that the photograph of Ong Guey Chuck shows a circular scar on the right cheek near the outer corner and above the mouth, this scar having a smaller scar above it. Upon examination the applicant was found to bear such scars in the identical location above stated, which may be noted on Exhibit 'D.' The photograph of Ong Guey Chuck shows a scar on the right side of the nose, level with the right eye. The applicant has a scar in the same location, and such scar may be noted on Exhibit 'D.'

"An examination of the photograph of Ong Guey Chuck shows that his left eye appears to be smaller than his right eye. Personal examination of the applicant reveals this same characteristic. The Board of Special Inquiry found that the applicant has marks and scars which are not shown on the photograph of Ong Guey Chuck but that the photograph of Ong Guey Chuck shows no marks or scars that are not present on the applicant.

"The Board of Special Inquiry called before it Inspector Raymond M. Tong, who has had some eight years' experience, five years of this time being as chairman of a Chinese Board of Special Inquiry.

He testified that he has had wide experience in the comparison of applicants and photographs, and the identification of applicants with such photographs. He examined the photographs in the record, and after an examination of the photograph of the applicant and the photograph of Ong Guey Chuck, in San Francisco file 16048/5-1, he gave as his opinion that they represented the same person.

"On behalf of applicant one John L. Harris submitted a written statement. He claims to be an expert in the examination of questionable documents. He claims to have testified in regard to such matters before the Federal Courts. In his opinion the evidence presented by the photographs of Ong Guey Chuck and the applicant is vague, uncertain and unreliable, and in his opinion it is not reasonable to assume upon such evidence that these two photographs represent the same person. He makes no reference to nor gives any consideration to the fact that the applicant bears four or five scars and characteristics which are identical with those shown on the photograph of Ong Guey Chuck. In addition to his written statement, he has taken an enlarged photograph of Ong Guey Chuck and superimposed thereon a photograph of the applicant, and claims that this comparison indicates that they are not identical, pointing out that the chin of the applicant in his photograph is apparently longer than the chin of Ong Guey Chuck. There is no way of determining whether the difference in the length of the chin is due to the additional weight of the applicant as compared with that of Ong Guey Chuck, who was a slender young man at the time the photograph was taken, or what part of the length of the chin is due to flesh accumulation.

"The witness, Quan Shee, testified that she first saw the applicant on May 24, 1937, when he was

approximately forty-one years of age. She states that she became acquainted with Ong Guey Bet in the United States four or five years ago, and that at his instance she went to the Suey Low Village where she visited the home of the applicant's alleged mother. She says that she was in the village about one-half hour and again visited the village for about the same time before her return to the United States. She has never met the applicant's alleged father and knows nothing about the applicant's family or his occupation, and has no way of knowing that the applicant is a son of his alleged father, Ong You, except what she was told by Ong Guey Bet.

"In the opinion of the Board of Review the applicant has been shown by the photographic evidence to be identical with the Ong Guey Chuck who was rejected in 1917. When it is considered that the features of Ong Guey Chuck and the applicant are of the same formation in every particular and that the applicant bears a number of scars which appear on the photograph of Ong Guey Chuck the conclusion is inescapable that they are one and the same person. If this be the fact, the applicant is seeking to secure admission by fraud.

"It is recommended that the appeal be DISMISSED."

It will thus be seen that the discrepancies which formed the basis of the excluding decision were on important and material matters. These discrepancies, coupled with the applicant's identification with the previously excluded and deported Ong Guey Chuck and other minor discrepancies in the testimony, afford substantial basis for the Board's decision and the holding that the applicant has not sustained the burden of proof. We will briefly discuss these various discrepancies:

Discrepancies Relating to the Home Village.

Bearing in mind the size of the home village and the mature ages of the actors in this case, it is not unreasonable nor unfair to require an exact agreement among them as to the size and composition thereof. There is no such agreement.

Let us compare the testimony of the applicant with that of his alleged father and witness brother regarding the number of houses in the village in which he claims to have been born and raised. We find these differences:

On April 28, 1915 [see File No. 22403/6-5], the witness Ong Guey Bet testified, under oath at San Francisco, that there were *twelve (12) houses* in the village. In the same proceeding the *alleged father* testified, May 22, 1915, that there were but *twelve (12) houses.* Again, on April 11, 1917 [see File 16048/5-1], Ong Guey Bet testified there were but *twelve (12) houses,* and in the present proceeding he testified his previous statements regarding the number of houses in the home village were correct [see Immigration Record p. 32]. But what does this applicant say concerning the number of houses in the village in which he claims to have been born and lived for 43 years—the greater part of his life? In contradiction of the testimony of his alleged father and brother he testified there were *fourteen (14) houses* until 1917, and *fifteen (15) houses* and one (1) lantern house thereafter. The applicant's testimony in this connection [see Immigration Record p. 12] reads as follows:

"129 Q How large is the SUEY LOW VILLAGE?

A It has 15 dwelling houses and one lantern house.

130 Q How long has the village had fifteen dwelling houses and one lantern house?

A Since C. R. 6 (1917) in that year my uncle built a house, prior to that time there were only *14 dwelling houses*. The lantern house was also built in C. R. 6 (1917).

131 Q Is your uncle's house and the lantern house the only buildings which have been built in your village *within your memory?*
A Yes.

132 Q Then is it correct that all during your memory there were always 14 houses in the village until C. R. 6 (1917) when your uncle built a house and when the lantern house was built?

A No, not exactly, there was a lantern house prior to C. R. 6 (1917). It was located at the tail or west side of the village, but that lantern house for some reason was taken down and a new one built at the head or east of the village. There were only *14 dwelling houses* until C. R. 6 (1917) when my uncle built his house. Those fourteen houses were there during my memory." (Italics ours.)

The alleged brother witness, who had testified there were but twelve houses in 1915 and 1917, made a trip to China in 1921 and remained there until 1923. He then found but one change in the number of buildings. He testified [Immigration Record p. 33]:

"375 Q I will again ask you what changes there was in the village from the time of your departure in 1915 as between your visit to the village in 1921 to 1923?

A The only difference is the building of the new school house at the east side and the disappearance of the old lantern house or school house at the west side."

There is not only a variance as to the number of houses in this diminutive village of 12 houses, but also a disagreement as to their arrangement [see Immigration Record p. 13]:

Applicant testifies:	On Guey Bet testifies:
The village has 5 rows.	The village has 5 rows.
The first row has 1 house.	The first row has 2 houses.
The second row has 2 houses.	The second row has 4 houses.
The third row has 4 houses.	The third row has 4 houses.
The fourth row has 4 houses.	The fourth row has 2 houses.
The fifth row has 4 houses.	The fifth row is vacant.

Then there is also the discrepancy as to the names and identity of some of the occupants of the several houses in the village. These are matters upon which there should be complete agreement if the applicant is in fact the person he claims to be. Bearing in mind the size of the village (12 houses), and the mature ages of the parties, can it be fairly said that it was unreasonable to reject the applicant's claim? Appellee submits that these discrepancies are sufficiently serious to preclude the determination that the applicant was denied a fair hearing or that the District Court committed error in sustaining the findings of the Board. The cases are legion where the courts have refused to interfere because of the existence of less serious discrepancies. In the case of

Jew Thew v. Nagle (C. C. A. 9), 35 F. (2d) 858,

there were conflicts as to the location of the few houses in the village and whether the applicant's prior landed brother lived in his house just prior to applicant's coming to the United States. In that of

> *Chin Share Nging v. Nagle* (C. C. A. 9), 27 F. (2d) 824,

there were discrepancies relating to the village school and as to who was living in front of his home. In that of

> *Sullivan ex rel. Jee Gim Bew v. Tillinghast* (C. C. A. 1), 28 F. (2d) 812,

there were disagreements between applicant's and his witnesses' testimony relating to the location of a fish pond. In that of

> *Lee How Ping v. Nagle* (C. C. A. 9), 36 F. (2d) 582,

inter alia discrepancies as to neighbors in rear of the home and across the street were held to be of the sort that tend to indicate the applicant was not a member of the family claimed.

Discrepancies Relating to Family.

The record shows that the applicant confused the families of two of his alleged paternal first cousins, giving the particulars of Ong Nguey Lin's family, and stating such particulars related to the family of his alleged cousin Ong Nguey Gim [see Immigration Record p. 5 *et seq.*]. True, he later corrected this testimony as to the head of the families [Immigration Record p. 20]. Also, the alleged cousin Ong Nguey Gim, when testifying on July 14, 1937 [File No. 37387/8-20], stated he had twin children. Ong You Som and Ong You Lim, born August 17, 1931, but the

applicant [Immigration Record p. 5] disagrees and testifies that such children are aged 8 and 7, respectivly. Further, the alleged cousin Ong Nguey Lin, on May 16, 1930, at the time of his last return from a trip to China [File 29160/6-1], testified he had but one child, a girl, then aged 2, born April 25, 1929, but the applicant states that this Ong Nguey Lin has three children, a girl, aged 8, and twin boys, aged 9. In considering these discrepancies it must be remembered that the families of these alleged cousins lived in applicant's home village of 12 houses and such children were born and raised there.

Applicant's Identification as the Previously Excluded Ong Guey Chuck.

Another important feature of this case appears in the identification of this applicant as the same person who, under the name of Ong Guey Chuck, sought admission at the port of San Francisco, California, April 16, 1917, as the alleged son of Ong You and whose claim was rejected [see File No. 16048/5-1]. Identification was made by a comparison of the photographs of said Ong Guey Chuck and the present applicant. The identification was made more complete through physical identification marks. The Board of Review covers this identification thoroughly, and we direct the Court's attention to the comments made thereon. The Board's memorandum has hereinbefore been copied in full.

Counsel for appellant complains of the applicant's identification with the previously excluded Ong Guey Chuck and charges that in so doing the Board disclosed a hostile determination to exclude. The Board had a right, as well as a duty, to determine whether or not this applicant was

attempting to perpetrate a fraud upon the United States. Such frauds sometimes succeed, but more often fail. It is for this reason that the Government expends money and effort to train officers to be alert against such frauds. And this prompted the Supreme Court of the United States in the case of

> *Tulsidas v. Insular Collector of Customs,* 262 U. S. 258, 265,

to say:

> "We think, rather, it will leave the administration of the law where the law intends it should be left, to the attention of officers made alert to attempts at evasion of it, and instructed by experience of the fabrications which will be made to accomplish evasion."

Now the Board members, who had opportunity to examine and observe the applicant, determined that he was the same person who, under the name of Ong Guey Chuck, unsuccessfully sought to gain admission to the United States in 1917. In this determination they were aided by a comparison of the applicant with the photograph of said Ong Guey Chuck and the expert opinion of Inspector Tong, who has had eight years' experience in the identification of Oriental photographs. On the other hand, the applicant presented a privately employed witness, one John L. Harris, who claimed to be an expert in the examination of questioned documents. He testified that in his opinion the evidence presented by the photographs of Ong Guey Chuck and the applicant is vague, uncertain and unreliable, and in his opinion it is not reasonable to assume upon such evidence that the two photographs represent the same person. He made no reference to nor gave any consideration

to the fact that the applicant bears four or five scars and characteristics which are identical with those shown on the photograph of Ong Guey Chuck. This witness had taken an enlarged photograph of Ong Guey Chuck and superimposed thereon a photograph of the applicant, and claims that this comparison indicates that they are not identical, pointing out that the chin of the applicant in his photograph is apparently longer than the chin of Ong Guey Chuck. Now, there is no way of determining whether the difference in the length of the chin is due to the additional weight of the applicant as compared with that of Ong Guey Chuck, who was a slender young man at the time the photograph was taken in 1917, or what part of the length of the chin is due to flesh accumulation. Also, it is practically impossible for any photographer to take a photograph of a person with the idea of superimposing it on another photograph because in order to successfully do so it must have been taken from the identical angle and the subjects must have been in the identical positions. Finally, even this witness admitted that the photographs could represent the same person. He testified [Immigration Record p. 50]:

> "450 Q In your opinion, however improbable, is it possible that these two photographs may represent the same person?
>
> A *Yes, I think it is possible, based on the general features of the face, that the photographs could represent the same person.*" (Italics ours.)

Under the circumstances it certainly was not unfair for the Board to disbelieve the opinion of the applicant's witness and adopt their own opinion, based on their observation and the testimony of Inspector Tong. The question was one of fact. The Board was the trier of the facts.

It was their duty to conclude whether or not the photographs represented the same person. The testimony of expert witnesses was to aid them in their deliberations. While the general rule is that a jury—in this case the Board—cannot arbitrarily disregard uncontroverted testimony when there is nothing either in the manner or appearance of the testimony itself which makes it improbable or casts discredit on it—the rule does not apply to opinion evidence. The Board may not impugn the motives or doubt the sincerity of the opinion witness, but this does not prevent it from disagreeing with him. "The Chamberlayne Trial Evidence" states, in Section 961, page 940:

> "In general then, opinion evidence including that of experts is not controlling upon the jury for while they may not question the motives or sincerity of the witness they may nevertheless disagree with him and disregard the opinion."

Underhill's Criminal Evidence, 3rd Edition, Section 186, page 261, states:

> "Expert opinions may be viewed by the jury as advisory and should be weighed in connection with all the evidence and they may be disregarded if the jury is convinced they are not correct."

The rule in cases of the kind here involved is less restrictive. The Board is the exclusive judge of the credibility of witnesses who testify before it and the courts in habeas corpus will not weigh conflicting evidence. See

Tisi v. Tod, 264 U. S. 131,

wherein Mr. Justice Brandeis said:

> "We do not discuss the evidence because the correctness of the judgment of the lower court is not to

be determined by inquiring whether the conclusion drawn by the Secretary was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."

See, also:

White v. Young Yen (C. C. A. 1), 278 F. 619;

Chin Ching v. Nagle (C. C. A. 9), 51 F. (2d) 64;

Quock Hoy Ming v. Nagle (C. C. A. 9), 54 F. (2d) 875.

Other Discrepancies.

The discrepancies hereinbefore mentioned are the principal ones. There are still other discrepancies which relate to the location of the temple and ancestral halls [Immigration Record p. 40].

Reply to Appellant's Brief.

It is an accepted rule in these Chinese cases where all the information is within the knowledge of the interested parties, that variances in testimony are about the only indicia of the truth or falsity of the story told by the applicant and his witnesses. There is no necessity to cite further decisions because the rule has been enunciated so many times that it is virtually axiomatic. The Immigration Board in this case, considering the discrepancies and variances shown at the hearing, have concluded that the appellant is not the son of Ong You.

Appellant's main contention is that the discrepancies did not afford substantial grounds for rejecting the applicant's claim. We have seen that the discrepancies relate to matters on which there should be complete agreement if the claimed relationship did in fact exist. The appellant offered no more testimony than was offered by the applicant in the recent case of

> *Won Yin Loon v. Carr* (C. C. A. 9), 108 F. (2d) 91,

where the excluding decision of the Board was affirmed. He offered less testimony than the applicant in the case of

> *Woon Sun Seung v. Proctor* (C. C. A. 9), 99 F. (2d) 285,

where it was held that discrepancies relating to the school and as to whether the father smoked when he was last in China, were held sufficient to justify rejection of the direct testimony of the applicant, his alleged father and a prior landed alleged brother.

Counsel also contends that the District Court erred in deciding that appellant "has had a fair trial in that no opportunity has been denied him to present evidence in his behalf" [T. 13]. But other than generalizations and conjectures, counsel fails to point out wherein a fair hearing was denied and wherein the Court so erred. He further complains because the District Court felt it was bound by the decision of the immigration officers in spite of the "clear and forcible presentation made in behalf of petition for the writ, and the possibility that the Court might readily reach an opposite conclusion" (Appellant's Brief p.

29). In so stating the District Court was not announcing a novel principle, but was following a well-settled principle of law governing the review of cases of this character. It went no further than the pronouncements of the Supreme Court and of this Circuit Court of Appeals: See:

Quon Quon Poy v. Johnson, supra;

Tisi v. Todd, supra;

Tulsidas v. Insular Collector of Customs, supra;

Woon Sun Seung v. Proctor, supra;

Lum Sha You v. United States, 82 F. (2d) 83, 84.

In the case last cited Circuit Judge Haney stated the rule in this language:

> "* * * *Even if the Board's decision seems to us to be wrong, but it is shown that it did not act arbitrarily, that it reached its conclusion after a fair consideration of all facts presented, and that the discrepancies are such that reasonable men might disagree as to their probative effect, appellant has no recourse to the courts."* (Italics ours.)

See, also:

Jung Yen Loy v. Cahill (C. C. A. 9), 81 F. (2d) 809.

For where there is jurisdiction, a finding of fact by the Executive Department is conclusive:

United States v. Ju Toy, 198 U. S. 253.

Appellee submits that the discrepancies developed in this case are sufficiently serious to preclude the determination that the applicant was not given a fair hearing or that the District Court erred in sustaining such findings.

Conclusion.

As the findings of the administrative officers are based on substantial evidence and as there has been no manifest abuse of discretion, appellee respectfully prays that the order of the District Court be affirmed.

Respectfully submitted,

BEN HARRISON,
United States Attorney,

By RUSSELL K. LAMBEAU,
Assistant United States Attorney,

Attorneys for Appellee.

No. 9459

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HAGAN AND CUSHING COMPANY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho, Central Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 60 3-26-40

No. 9459

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HAGAN AND CUSHING COMPANY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho, Central Division

PARKER PRINTING COMPANY. 545 SANSOME STREET. SAN FRANCISCO 60 3-28 40

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JOHN A. CARVER,
United States District Attorney,

E. H. CASTERLIN,
PAUL S. BOYD,
Assistant United States District Attorneys,
Boise, Idaho,
Attorneys for Appellant.

J. H. FELTON,
Moscow, Idaho,

MAURICE H. GREENE,
Boise, Idaho,
Attorneys for Appellee. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Idaho, Central Division

Law No. 1416

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAGAN AND CUSHING COMPANY,

Defendant.

COMPLAINT

Now comes the United States of America, by John A. Carver, United States Attorney for the District of Idaho, and brings this action on behalf of the United States of America against the Hagan and Cushing Company, said company having its office and place of business at Moscow, in the State of Idaho; this action being brought upon the suggestion of the Attorney General of the United States at the request of the Comptroller General of the United States, and upon information furnished by said Comptroller General.

Plaintiff, as grounds for its complaint against defendant, says:

(1) That on various dates *d*etween April 22, 1935, and November 20, 1935, defendant entered into certain contracts with the plaintiff under which defendant undertook to deliver, to various agencies of the United States Government, supplies including pork and pork products at prices fixed by bids duly submitted by defendant to plaintiff, and accepted by

plaintiff. Each of said contracts contained among others the following provision:

> "Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid."

(2) That the rates of processing tax imposed upon the products furnished by the defendant to plaintiff were fixed by the Secretary of Agriculture under the supposed authority of the Agricultural Adjustment Act of May 12, 1933, as amended, prior to the date set for the opening of the bids for the contracts. Defendant delivered the supplies pursuant to the contracts and plaintiff paid to the defendant the full prices bid, which [3] included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that Act on the products furnished by defendant to plaintiff.

(3) That for the month of April, 1935, and months subsequent thereto, defendant did not pay and has never paid to the United States, or to any of its officials, any amounts on account of the processing taxes levied under the supposed authority of the Agricultural Adjustment Act.

Defendant particularly did not pay to the United States or to any of its officials any amounts for processing taxes on account of the various supplies which it furnished the plaintiff under the contracts referred to above. A list of said contracts showing their official numbers, the date on which they were

entered into, and the amount of processing tax included in the bid price which was paid by the plaintiff to the defendant under each contract, is set forth below, as follows:

Contract Number	Date of Contract	Amount of Processing
W-5920-qm-ECW-546	April 22, 1935	$315.77
ER-W-5906-qm-ECW-20	April 25, 1935	49.40
ER-W-5920-qm-ECW-37	May 21, 1935	206.71
W-972-qm-702	June 24, 1935	55.00
W-5906-qm-ECW-72	June 24, 1935	49.40
W-972-qm-704	July 22, 1935	67.23
W-5906-qm-ECW-103	July 24, 1935	129.63
W-5906-qm-ECW-113	July 29, 1935	118.09
ER-W-5906-qm-ECW-123	August 21, 1935	53.12
W-972-qm-713	September 23, 1935	36.69
ER-W-5906-qm-ECW-178	October 22, 1935	502.88
ER-W-5906-qm-ECW-196	November 20, 1935	700.76
	Total	$2284.68

(4) That defendant, although repayment has been demanded, has never repaid to the plaintiff any part of the amounts of processing taxes set forth in Paragraph (3) hereof.

(5) That by reason of the foregoing, defendant is indebted to the plaintiff in the sum of Two Thousand Two Hundred Eighty-four Dollars and Sixty-eight Cents ($2,284.68).

Wherefore plaintiff prays for judgment against defendant in the sum of Two Thousand Two Hundred Eighty-four Dollars and Sixty-eight Cents

($2,284.68), with interest as provided by law, and for its costs herein expended.

JOHN A. CARVER
United States Attorney
Attorney for Plaintiff,
Boise, Idaho

(Duly verified)

[Endorsed]: Filed June 13, 1939. [4]

[Title of District Court and Cause.]

ANSWER

Comes now Hagan and Cushing Company, the defendant above named, and for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph (1) of plaintiff's complaint.

II.

Answering Paragraph (2) of said complaint, defendant denies the same and each and every allegation contained therein, save and except defendant admits that defendant admits delivery of supplies pursuant to the contracts referred to in said Paragraph and admits that plaintiff paid the full price.

Specifically, defendant denies that the full prices bid included any amounts for processing taxes and alleges that the bid prices did not include processing taxes in any amount whatsoever.

III.

Answering Paragraph (3) of plaintiff's complaint, defendant admits that for the month of April, 1935, and subsequent thereto defendant has not paid to plaintiff any amounts for processing taxes and admits that defendant has not paid plaintiff any amounts for processing taxes on account of supplies furnished [5] by defendant to plaintiff. Defendant further admits the list of contracts, their official numbers and the dates thereof as alleged in Paragraph (3) of plaintiff's complaint, but denies that any processing tax in any amount whatsoever was included in the bid price paid by plaintiff to defendant.

IV.

Answering Paragraph (4) of plaintiff's complaint, defendant denies each and every allegation therein contained.

V.

Answering Paragraph (5) of plaintiff's complaint, defendant denies each and every allegation therein contained.

Wherefore, Having fully answered plaintiff's complaint, defendant prays judgment that the same be dismissed.

J. H. FELTON
MAURICE H. GREENE
Attorneys for Defendant.

(Duly Verified)

[Endorsed]: Filed October 9, 1939. [6]

In the District Court of the United States for the District of Idaho, Central Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAGAN AND CUSHING COMPANY,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Court and a jury, the parties appearing by their respective counsel. A jury of twelve persons were regularly empaneled and sworn to try said action and evidence was introduced on the part of the plaintiff. At the close of the evidence introduced on the part of the plaintiff, and upon motion of defendant's counsel, which motion was, after argument of counsel for respective parties, granted by the Court, the Court instructed the jury to render a ver-

dict in favor of the defendant. After receiving the instructions of the Court, the jury returned its written verdict which was in words following, to-wit:

"In the District Court of the United States for the District of Idaho, Central Division

"UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAGAN AND CUSHING COMPANY,
Defendant.

VERDICT OF THE JURY

"We, the Jury in the above entitled cause, acting under the instructions of the Court, find for the defendant.

"MARTIN FILIPAK
Foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, [8]

It is Ordered and Adjudged that the plaintiff take nothing upon its Complaint herein and that said action be and the same is hereby dismissed.

Witness the Honorable Charles C. Cavanah, Judge of said Court and the seal thereof this 8th day of November, 1939.

W. D. McREYNOLDS
[Seal] Clerk

[Endorsed]: Filed November 8, 1939. [9]

[Title of District Court and Cause.]

TRANSCRIPT.

This matter came on for hearing before the Honorable Charles C. Cavanah, sitting with a jury at Moscow, Idaho, on November 8, 1939.

John A. Carver, United States District Attorney,

E. H. Casterlin, Assistant United States District Attorney

Paul S. Boyd, Assistant United States District Attorney

All of Boise, Idaho,

Attorneys for the plaintiff.

Maurice H. Greene, Boise, Idaho,
J. H. Felton, Moscow, Idaho,

Attorneys for the defendant.

G. C. Vaughan,
Reporter. [10]

November 8, 1939
Moscow, Idaho.

Mr. Casterlin: (opening Statement). We now offer as exhibit number 1, copies of the contract which were heretofore deposited with the Clerk, the same being certified copies. At the same time we offer as part of exhibit number 1, Statement and certificate of award; delivery order; purchase order; bid together with instructions to bidder attached thereto; certificate of compliance; subsistence schedule; Treasury warrants applicable to each

respective contract; vouchers for purchases, services other than personal; statement of Hagan & Cushing; certificate of Hagan & Cushing; certificate as to correctness of the bill; delivery order. All in respect to the contract dated April 22, 1935 number W 5920; QMECW 546 and likewise all corresponding papers in connection with each of the succeeding contracts mentioned in paragraph 3 of plaintiff's complaint.

Mr. Green: We have no objection to the contracts but I believe it might be more convenient if each contract might be marked as a separate exhibit.

Mr. Casterlin: I limit the offer as exhibit 1 now to the stated items in connection with the contract dated April 22, 1935. At the same time I offer as exhibit number 2 all the papers enumerated in connection with exhibit [11] 1,—I offer now in connection with the contract dated April 25, 1935, and I offer as exhibit 3 the respective papers in connection with contract dated May 21, 1935, and I also offer as exhibit 4 the respective papers in connection with the contract of June 24, 1935 further described as W972 QM 702 and as exhibit number 5, all the respective papers in connection with contract dated June 24, 1935 described as W 5906 QMECW 72; and as exhibit number 6, the same respective papers in connection with the contract dated July 22, 1935; as exhibit 7 the respective papers in connection with the contract dated July 24, 1935; as exhibit number 8, the respective papers in connection with contract dated July 29, 1935; and

as exhibit number 9, the respective papers in connection with the contract dated July,—in connection with the contract dated August 21, 1935 and the same papers in connection with the contract dated September 23, 1935 as exhibit 10, and as exhibit 11, the same papers in connection with contract dated October 22, 1935; as exhibit number 12, the same papers in connection with the contract dated November 20, 1935; the dates given are more particularly described by reference to paragraph 3 of the complaint, I am using the dates mentioned in the complaint as a matter of brevity.

Mr. Green: We have no objection to the admission. [12]

Mr. Casterlin: At this time I ask permission to read from these contracts, or any of the exhibits at any time during these proceedings.

The Court: Very well.

(Portion of
PLAINTIFF'S EXHIBIT No. 1)

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Page No. 1

Standard Government Form No. 31
Approved by the President.,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID SUPPLY CONTRACT

Duplicate

Bid No. QM 972-36-1
Date Issued: July 12, 1935
Opening Date for This Bid: 1:30 P. M., July 22, 1935

To: Quartermaster,
Fort George Wright, Washington.

Place: Spokane, Wn.
Date: 7-22-35

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered:
the undersigned, Hagan and Cushing
a Corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Spokane Wn
hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated

opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within net days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days net per cent; 20 calendar days net per cent; 30 calendar days net per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter [27] date is later than the date of delivery)

HAGAN AND CUSHING CO.
(Full name of Bidder.)
By A. J. WHITE Mgr
(Name & Title)
902 No Monroe
(Address)
Spokane

A. E. HAGAN
(Witness to Signature)

2-4 [28]

* * * * * * *

Page No. 4

Taxes:

Bidders are advised that any tax imposed by the Revenue Act of June 6, 1932, should be included in the selling price. (See Pages No. 4 & 5, Par. 15, (b) (c) and (d) of said Revenue Act.)

Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid by the Contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the Contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

Bids containing conditions modifying this paragraph in any manner will not be considered.

Bidders are informed that State Taxes are not applicable on purchases by the Federal Government, and should not be included in prices bid.

The standard tax clause which is printed in and forms a part of your bid should not be modified or changed, but you should state on your bid that State Taxes are not included and will not be invoiced. [28-A]

* * * * * * *

(Portion of
PLAINTIFF'S EXHIBIT No. 1
requested by Appellee)

Page No. 7

Standard Form No. 36 QM 972-36-1 (Subsistence)

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORMS

No. 30-33

SUPPLIES FOR AUGUST, 1935

Item No.	Articles	Unit	Quantity	Unit Price	Amount Dollars	Amount Cents
1.	Bacon, smoked, Type 1, dry, sugar box cured, Grade #2, 8 to 10-lbs. Fed. Spec., PP-B-81	lb	1200	.35		
2.	Beef Quarters, fresh, chilled (Type), Class 1 (steer), Grade "B", (Medium). To be wrapped in cheese cloth or stockinette and sewed in new burlap. *Conformation.*— The carcass may be slightly angular and moderately thick. Rounds shall be moderately short and thick. Loins and ribs shall be moderately thick to slightly flattened. Chucks shall be moderately thick with a tendency toward flatness and neck shall be moderately short. *Finish.*— The fat shall be white to a yellowish tinge, moderately firm, may be irregularly distributed and shall be thickest over the back but may be very thin or absent in small areas over the round, and fades out over the chuck, neck and shanks. There shall be at least a small amount of fat over the internal surface of the ribs and there shall be a moderate amount of the remainder of the internal fats. The kidney shall be covered with fat. *Quality.*— The flesh may be slightly soft with a small amount of marbling in the lighter weight and a moderate amount in the heavier carcasses and of moderately fine texture. The color shall be red to a slightly darker red. The chin bones shall be soft and red in the light weight carcasses and shall be topped with pearly white cartilage, but may be fairly hard and tinged with white and topped with very little cartilage in the heavier carcasses. *General.**—					

Item No.	Articles	Unit	Quantity	Unit Price	Amount Dollars	Amount Cents
	The carcass shall have an average amount of lean meat and from a small to a moderate amount of marbling. The fats may be irregularly deposited, often being wasty in certain regions and deficient in others. (Fed. Spec., PP-B-221)	lb	5000			
3.	Butter, Grade C, 90-score, 1# prints. Fed. Spec., C-B-801.	lb	2000			
4.	Cheese, American Cheddar, U. S. #1, Grade B., Fed. Spec., C-C-271	lb	400			
5.	Chicken, Roasting, Class 1c (1) Grade A., Commercial Pack. Fed. Spec., PP-C-251a.	lb	800			
6.	Eggs, fresh, Class A, Grade b3(2) U. S. Extras. Fed. Spec., C-E-271.	doz	3000			
7.	Eggs, fresh, Sales, U. S. Extras. Cartons. One dozen to a carton. Fed. Spec., C-E-271.	doz	500			
8.	Lard, Pure, 1# cartons, Type 1. Fed. Spec., PP-L-101.	lb	300			
9.	Lard, Sub., Type 2, packed in 20# net wt. Commercial Containers, Fed. Spec., EE-L-101a.	lb	1500			
10.	Lard, Sub., Type 1., packed in 3# cans. Fed. Spec., EE-L-101a.	can	120			
11.	*Milk, fresh, Type 1, Grade A. Packaging in Quart Bot. Fed. Spec., C-M-381A.	bot	6250			[69]
	Page No. 8					
12.	Pork Hams, Fresh, chilled, Grade A, Commercial Pack. Fed. Spec., PP-P-571.	lb	1000	.2267		
13.	*Potatoes, Irish, U. S. Grade #1, packed in 100# net wt. new sacks. Spec., HHH-P-611.	lb	20,000			

Item No.	Articles	Unit	Quantity	Unit Price	Amount Dollars	Amount Cents
14.	*Onions, fresh, Type A, Grade #1., Packed in 50# net wt. sacks, new. Fed. Spec., HHH-O-531.	lb	2000			
15.	Bacon, smoked, Type 1, dry, sugar box cured, Grade #1. 4 to 6-lbs Fed. Spec., PP-B-81.	lb	500	.38		
16.	Butter, Grade B, 92-score, 1# cartons, Commercial Pack. Fed. Spec., C-B-801.	lb	1000			
17.	Ham, smoked, swt, pkld, cured, Type 1, Grade 1, Commercial Pack. 10 to 12-lbs. Fed. Spec., PP-H-71	lb	1500	.2624		
18.	Beef Chucks, Grade "B" Medium; Commercial Pack. Fed. Spec., PP-B-221.	lb	200	.0850		
19.	Beef Rounds, Grade "B" Medium Commercial Pack. Fed. Spec., PP-B-221.	lb	200	.1587		
20.	Liver, Beef, Class A, Type 1, Fed. Spec., PP-L-351.	lb	200	.1217		
21.	Pork Loins, fresh, Grade A, Commercial Cut & Pack, Fed. Spec., PP-P-571-2.	lb	400	.2367		
22.	Pork Lean Backs, fresh, Grade A, Commercial Cut & Pack, Fed. Spec., PP-P-571-2.	lb	100	.2824		
23.	Pork Shoulders, fresh, Grade A, Commercial Cut & Pack. Fed. Spec., PP-P-571-2.	lb	300	.1767		
24.	Pork Spare Ribs, fresh, Grade A, Commercial Cut & Pack. Fed. Spec., PP-P-571-2.	lb	400	.1387		

Item No.	Articles	Unit	Quantity	Unit Price	Amount Dollars	Amount Cents
25.	Sausage, Franks, uncolored, Type 1, Grade A. Commercial Pack. Fed. Spec., PP-S-81.	lb	250	.1393		
26.	Sausage, Bologna, Type 1, Grade A, Commercial Pack. Fed. Spec., PP-S-71.	lb	100	.1393		
27.	Sausage, Pork, fresh, bulk, Type 5, Grade A. Commercial Pack. Fed. Spec., PP-S-91.	lb	100	.1923		
28.	Sausage, Pork Links, Type 1, Grade 1, Commercial Pack-Fed. Spec., PP-S-91.	lb	100	.2497		
						[70]
	Page No. 9					
29.	Boston Butts, smoked, Commercial Cut & Pack. Fed. Spec., PP-P-571.	lb	300	.2397		
30.	Beef, Dried, 5# pkgs. Shall comply with Fed. Spec., PP-B-211 with the exceptions that it shall not be packed in tins. Grade A.	lb	50			
31.	Beef, Corner, fresh, boneless. Shall be of good quality meat free from blood clots, skin, stringy fiberous tissue, tendons & excessive fat. Meat from shanks, flanks, skirts, and navel end of plates, not to be included.	lb	200	.1393		
32.	*Bread, Soft, Rye, Type D. 2# loaves. Fed. Spec., EE-B-671.	lb	450			
33.	*Buttermilk, fresh, Type B, in bulk. Fed. Spec., C-B-816., Par. E-2.	gal	100			
34.	Chickens, Fryers, Class B-1-b, Grade A. Fed. Spec., PP-C-251a.	lb	500			

Item No.	Articles	Unit	Quantity	Unit Price	Amount Dollars	Amount Cents
35.	*Clams, fresh, hard shell. 150/170 to gal. Open, shell removed. Fed. Spec., PP-C-401.	QT	10			
36.	*Cream, fresh, Type 2, Fed. Spec., C-C-671.	QT	10			
37.	*Salmon, Fresh, Fed. Spec., PP-F-381.	lb	100			
38.	*Fish, Black Cod. Fed. Spec., PP-F-381.	lb	75			
39.	*Fish, Halibut, Fed. Spec., PP-F-381.	lb	200			
40.	*Fish, Smelt, fresh, Fed. Spec., PP-F-381.	lb	100			
41.	Ham, Boiled, Best Grade	lb	150	.3393		
42.	Headcheese, No Cereal, No Colors. Fed. Spec., PP-H-191.	lb	100	.1567		
43.	*Ice Cream, Qt. Bricks, asstd. flavors, Fed. Spec., EE-I-116.	QT	400			
44.	Lamb, fresh, carcass, Choice Grade. Fed. Spec., PP-L-91.	lb	100	.1197		
45.	Leg of Lamb, fresh, Choice Grade. Fed. Spec., PP-L-91.	lb	100	.17		
46.	Liver, fresh, Calf, Class A. Type 1. Fed. Spec., PP-L-351.	lb	100	.2391		
47.	Mutton, fresh, Side, Grade "A". Fed. Spec., PP-M-791.	lb	200	.07		

[71]

Page No. 10

48.	Leg of Mutton, Grade "A". Fed. Spec., PP-M-791.	lb	100	.12		
49.	*Oysters, fresh, Grade B. Fed. Spec., PP-O-956a.	gal	5			
50.	Pig's Feet, Type B-1a. Fed. Spec., PP-P-371.	lb	100	.05		

Item No.	Articles	Unit	Quantity	Unit Price	Amount Dollars	Amount Cents
51.	Sausage, Liverwurst, Best Grade, Chilled. Fed. Spec., PP-S-86.	lb	100	.1377		
52.	Sausage, Salami, fresh, Best Grade.	lb	75	.2223		
53.	Sausage, Summer, fresh, Best Grade.	lb	75	.22		
54.	Tongue, Beef, fresh	lb	100	.1117		
55.	Veal, fresh, Side, Choice Grade, Chilled. Fed. Spec., PP-V-191.	lb	300	.1224		
56.	Leg of Veal, fresh, Choice Grade, chilled. Fed. Spec., PP-V-191.	lb	200	.20		
57.	Veal Loaf, fresh. Shall be made of choice quality veal, free from blood clots, bruises, skin, fiberous tissue, tendons, excessive fat or cereals.	lb	100	.17		
58.	*Candy, Chocolate, 1-lb boxes, Type A., Assorted. To contain not less than eight (8) different varieties proportionately assorted. (X) Sample Required. Fed. Spec., EE-C-71.	box	100			

Items marked with * are to be delivered F.O.B. Ft. Geo. Wright, Washington. Other items F.O.B. Spokane, Washington.

[72]

(Portion of
PLAINTIFF'S EXHIBIT No. 2)

CCC 5906-36-4 12
Sheet No. 1

Standard Form No. 31
Approved by the President.,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID
(SUPPLY CONTRACT)

Pacific Standard Time

Original

Opening Date for This Bid: 10:00 A. M. July 29, 1935

To: District Quartermaster
Civilian Conservation Corps
Lewiston, Idaho

Place: Lewiston Idaho
Date: July 29, 1935.

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered CCC 5906-36-4 Sheets 1 to 22, Incl.
the undersigned, Hagan & Cushing Co.
a Corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Moscow Idaho
hereby proposes to furnish, within the time speci-

fied, the materials and supplies at the prices stated opposite the respective items listed on the Schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter [29] date is later than the date of delivery)

HAGAN & CUSHING CO.
(Full name of Bidder.)
A. E. HAGAN,
Sec.
Moscow, Ida
(Address)

DONALD MacQUAID
(Witness to Signature)
List Sheet Removed Here:

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
4-5 [30]

* * * * * * *

Sheet No. 4

Tax Clauses

Price (s) bid herein includes any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustments charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (Or invoices) as separate items. (This provision will be included in the contract.)

Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid. The standard tax clause which is printed in and forms a part of your bid should not be modified or changed but you should state on your bid that state taxes are not included and will not be invoiced as a separate item. [31]

(Portion of
PLAINTIFF'S EXHIBIT No. 3)

CCC 5906-36-1

Sheet No. 1

Standard Form No. 31
Approved by the President.,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID
(SUPPLY CONTRACT)
SUBSISTENCE

Pacific Standard Time

Original

Opening Date For This Bid: 10:00 A. M. July 22, 1935

To: District Quartermaster
Civilian Conservation Corps
Lewiston, Idaho

Place: Moscow Idaho
Date: July 22, 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the re-

verse hereof or on the accompanying schedules, numbered: CCC 5906-36-1 Sheets 1 to 25, Incl.
the undersigned, Hagan & Cushing Co
a Corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Moscow Idaho
hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter [32]

date is later than the date of delivery)

HAGAN & CUSHING CO
(Full name of Bidder.)
A. E. HAGAN
Sec-Treas
Moscow, Idaho
(Address)

DONALD MacQUAID
(Witness to Signature)

List Sheets Removed Here:

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
6-4 [33]

* * * * * * *

Sheet No. 3

Tax Clauses

Price (s) bid herein includes any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after

the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bed, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in his bed will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (Or invoices) as separate items. (This provision will be included in the contract.)

Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid. The standard tax clause which is printed in and forms a part of your bid should not be modified or changed but you should state on your bid that state taxes are not included and will not be invoiced as a separate item. [34]

(Portion of
PLAINTIFF'S EXHIBIT No. 4)
CCC 5906-36-6

#25

Sheet No. 1

Standard Form No. 31
Approved by the President.,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID
Pacific Standard Time

Duplicate

Opening Date for This Bid: 1:00 P. M., August 19, 1935

To: District Quartermaster,
Civilian Conservation Corps,
Lewiston, Idaho

Place: Lewiston, Idaho
Date: August 19, 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: CCC 5906-36-6, Sheets 1 to 34, inclusive the undersigned, Hagan & Cushing Company
a Corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Moscow, Idaho
hereby proposes to furnish, within the time speci-

fied, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter [35] date is later than the date of delivery)

HAGAN & CUSHING COMPANY
(Full name of Bidder.)
A. E. HAGAN
Moscow, Idaho
(Address)

DONALD MacQUAID
(Witness to Signature)

List Sheets Removed Here:

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
8-5 [36]

* * * * * * *

Sheet No. 3

Tax Clauses

Price (s) bid herein includes any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (Or invoices) as separate items. (This provision will be included in the contract.)

Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid. The standard tax clause which is printed in and forms a part of your bid should not be modified or changed but you should state on your bid that state taxes are not included and will not be invoiced as a separate item. [37]

(Portion of
PLAINTIFF'S EXHIBIT No. 5)

CCC 5906-36-22

#26

Sheet No. 1

Standard Form No. 31
Approved by the President.,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID
SUBSISTENCE AND IGE

Pacific Standard Time.

Original

Opening Date for This Bid: 10:00 A. M., October 17, 1935 Sheet No. 1 to 41 Inc

To: District Quartermaster
Civilian Conservation Corps
Lewiston, Idaho.

Place: Moscow Idaho
Date: Oct 17, 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse

hereof or on the accompanying schedules, numbered:
the undersigned, Hagan & Cushing Co.
a Corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Moscow Idaho
hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certi-

fied by the contractor is received if the latter [38] date is later than the date of delivery)

HAGAN & CUSHING CO.
(Full name of Bidder.)
A. E. HAGAN
Sec.
Moscow, Idaho
(Address)

H. J. LOVELESS
(Witness to Signature)

List sheets removed here:

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
10-1803 10-5 [39]

* * * * * * *

Sheet No. 3

11. Taxes:

a. Bidders are advised that any tax imposed by the Revenue Act of June 6, 1932, should be included in the selling price. (See Pages No. 4 & 5, par. 15, (b), (c) and (d) of said Revenue Act.

b. Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or charged by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies herein contracted for and are paid to the Government, then the prices named in this bid will be increased or decreased accordingly and any amount due the Contractor as a result of such change will be charged to the Government and entered on voucher (or invoice) as separate items. [40]

(Portion of
PLAINTIFF'S EXHIBIT No. 6)
CCC 5906-36-30

25

Sheet No. 1

Standard Form No. 31
Approved by the President.,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID
(SUPPLY CONTRACT)
Subsistence

Standard Pacific Time.

Original

Opening Date for this Bid: 10:00 A. M. November 18, 1935

To: District Quartermaster
Civilian Conservation Corps
Lewiston, Idaho.

Place: Moscow, Idaho
Date: Nov. 18, 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: 1 to 35, incl.
the undersigned, Hagan & Cushing Co.
a Corporation organized and existing under the laws of the State of Idaho
a partnership consisting of

an individual trading as
of the city of Moscow, Idaho
hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter [41] date is later than the date of delivery)

HAGAN & CUSHING CO.
(Full name of Bidder.)
A. E. HAGAN
Sec.
Moscow, Idaho
(Address)

DONALD MacQUAID
(Witness to Signature)
List sheets removed here.
(Sheets 2 to 10 must not be removed)

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
10-1803 12-5 [42]

* * * * * * *

Sheet No. 3

11. Taxes:

a. Bidders are advised that any tax imposed by the Revenue Act of June 6, 1932, should be included in the selling price. (See Pages No. 4 & 5, par. 15, (b), (c) and (d) of said Revenue Act.

b. Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or charged by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies herein contracted for and are paid to the Government, then the prices

named in this bid will be increased or decreased accordingly and any amount due the Contractor as a result of such change will be charged to the Government and entered on voucher (or invoice) as separate items. [43]

(Portion of

PLAINTIFF'S EXHIBIT No. 7)

#1

Page #1

Standard Gov't. Form No. 31.
Approved by the President,
June 10, 1927.

STANDARD GOVERNMENT FORM OF BID SUPPLY CONTRACT

Original
Duplicate
Triplicate
Indicate by making
Erasure.

Bid No. QM 972-36-7.
Date Issued: September 12, 1935.

Opening Date for this Bid: 1:30 (P. S. T.) P. M. September 23, 1935

To: Quartermaster,
Fort George Wright, Wash.

Place: Spokane Wn
Date: 9-23-35

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse

hereof or on the accompanying schedules, numbered:
the undersigned, Hagan and Cushing Co.
a Corporation organized and existing under the laws of the State of: Idaho. A partnership consisting of: .....
an individual trading as.....
of the city of Spokane Wash. hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within net days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Std. Gov't. Form of Contract (Std. Form #32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days: net per cent; 20 claendar days: net per cent; 30 calendar days: net per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certi-

fied by the contractor is received if the latter date is later than the date of delivery.)

HAGAN AND CUSHING CO.
(Full Name of Bidder.)
By A. G. WHITE Mgr.
(Name and Title.)
902 No. Monroe
(Address.)

M. J. TIMELL
(Witness to Signature.)
14-3 [44]

* * * * * * *

Page No. 4

Taxes:

Bidders are advised that any tax imposed by the Revenue Act of June 6, 1932, should be included in the selling price. (See Pages No. 4 & 5, Par. 15, (b) (c) and (d) of said Revenue Act.)

Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid by the Contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the Contractor as a result of such change will be charged to the Government

and entered on vouchers (or invoices) as separate items.

Bids containing conditions modifying this paragraph in any manner will not be considered.

Bidders are informed that State Taxes are not applicable on purchases by the Federal Government, and should not be included in prices bid.

The standard tax clause which is printed in and forms a part of your bid should not be modified or changed, but you should state on your bid that State Taxes are not included and will not be invoiced as separate items. **[45]**

(Portion of

PLAINTIFF'S EXHIBIT No. 8)

Standard Government Form No. 31 15
Approved by the President.
June 10, 1927.

Page No. 1

STANDARD GOVERNMENT FORM OF BID SUPPLY CONTRACT

Original
Duplicate
Triplicate

Indicate by making Erasure.

Bid No. QM-972-35-35

Date Issued June 14, 1935

Opening Date for this Bid: 1:30 P. M. June 24, 1935

To: The Quartermaster
Fort George Wright, Washington

Place: Spokane
Date: June 24-35

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered:

the undersigned, Hagan & Cushing Co.
a Corporation organized and existing under the laws

of the State of: Idaho. A partnership consisting of: .....

an individual trading as.....

of the city of Spokane Wash hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within net days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days: net per cent; 20 calendar days: net per cent; 30 calendar days: net per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certi-

fied by the contractor is received if the latter date is later than the date of delivery.)

.....

(Full Name of Bidder.)
By HAGAN & CUSHING Co.
(Name and Title.)
(Name undecipherable)
902 N. Monroe
Spokane, Wash.
(Address.)

G. C. OLSON,
(Witness to Signature)

16-4 [46]

* * * * * * *

Sheet 1-A

Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sale tax, processing tax, adjustment charges, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items. (This provision will be included in the contract.)

Bidders are informed that State Taxes are not applicable on purchases by the Federal Govern-

ment and should not be included in prices bid.

The standard tax clause which is printed in and forms part of your bid should not be modified or changed but you should state on your bid that state taxes are not included and will not be invoiced as a separate item. [47]

(Portion of

PLAINTIFF'S EXHIBIT No. 9)

ER-W-5920-QM-ECW

37

23

Standard Government Form No. 31
Approved by the President.
June 10, 1927.

Page No. 1

STANDARD GOVERNMENT FORM OF BID SUPPLY CONTRACT

Duplicate

Bid No. 5920-35-93-ECW
Issued May 11, 1935

Opening Date for this Bid: May 21, 1935—10:00 A. M.

To: District Quartermaster,
Fort George Wright, Washington

Place: Spokane Wn
Date: May 21 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse

hereof or on the accompanying schedules, numbered:
the undersigned, Hagan & Cushing Co.
a Corporation organized and existing under the laws of the State of: Idaho. A partnership consisting of: .....
an individual trading as.....
of the city of Moscow, Idaho hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days: ..... per cent: 30 calendar days: ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified

by the contractor is received if the latter date is later than the date of delivery.)

HAGAN & CUSHING CO.
(Firm Name of Bidder.)
By A. E. HAGAN
Title: Sec Treas
Moscow Ida
(Full Address)

DONALD MacQUAID
(Witness to Signature)

18-4 [48]

* * * * * * *

Page No. 5

b. Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid by the Contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the Contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items. (This provision will be included in the contract.)

c. Bidders are informed that State Taxes are not applicable on purchases by the Federal Government, and should not be included in prices bid. [49]

(Portion of

PLAINTIFF'S EXHIBIT No. 10)

Standard Form No. 31
Approved by the President
June 10, 1927

CCC 5906-35-50

#27

STANDARD GOVERNMENT FORM OF BID
(Supply Contract)
SUBSISTENCE

Sheet No. 1

Pacific Standard Time

Triplicate

Opening Date for this Bid: 10:00 A. M., April 23, 1935

To District Quartermaster, CCC.,
Lewiston, Idaho

Place—Lewiston Idaho
Date—April 23, 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: CCC 5906-35-50, Sheets 1 to 17 incl.
the undersigned, Hagan & Cushing Co.
a corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Moscow Idaho hereby proposes to

furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the Schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days ..... per cent; 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.)

HAGAN & CUSHING CO
(Full name of bidder)
A. E. HAGAN
Sec Treas
Moscow Idaho
(Address)
C. FRED JOCKHECK
(Witness to signature)

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
20-5 [50]

* * * * * * *

Sheet No. 2

Tax Clauses

Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (or invoices) as separate items. (This provision will be included in the contract.)

Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid. [51]

(Portion of
PLAINTIFF'S EXHIBIT No. 11)
CCC 5906-35-72

Standard Form No. 31
Approved by the President
June 10, 1927

STANDARD GOVERNMENT FORM OF BID
(Supply Contract)
SUBSISTENCE

Sheet No. 1

Pacific Standard Time

Original
#29

Opening Date for this Bid 10: A. M., June 20, 1935.

To District Quartermaster
Civilian Conservation Corps
Lewiston, Idaho

Place—Moscow, Idaho
Date—June 20, 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: CCC 5906-35-72 Sheets

the undersigned, Hagan & Cushing Co.
a corporation organized and existing under the laws of the State of Idaho
a partnership consisting of
an individual trading as
of the city of Moscow Idaho hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the Schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days ..... per cent; 20 calendar days ..... per cent; 30 calendar days ..... per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certi-

fied by the contractor is received if the latter date is later than the date of delivery.)

HAGAN & CUSHING CO
(Full name of bidder)
A. E. HAGAN
Sec. Tre.
Moscow, Idaho
(Address)

DONALD MacQUAID
(Witness to signature)

List Sheets Removed Here:

Note.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: "I certify that the above bill is correct and just and that payment therefor has not been received."

(over)

O U. S. Government Printing Office: 1933
22-6 [52]

* * * * * * *

Sheet No. 3

Tax Clauses

Price—s bid herein includes any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, proc-

essing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (Or invoices) as separate items. (This provision will be included in the contract.)

Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid. The standard tax clause which is printed in and forms a part of your bid should not be modified or changed but you should state on your bid that state taxes are not included and will not be invoiced as a separate item. [53]

(Portion of
PLAINTIFF'S EXHIBIT No. 12)

Standard Government Form No. 31
Approved by the President
June 10, 1927

6

Page No. 1

STANDARD GOVERNMENT FORM OF BID
(Supply Contract)

ECW W-5920-QM-ECW 546

Original) Indicate
) by making
) erasure

Bid No: 5920-35-85-ECW
Issued: April 12, 1935

Opening Date for this Bid: 10:00 A. M., April 22, 1935.

To District Quartermaster,
Fort George Wright, Washington

Place Spokane, Wn
Date April 22 1935

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered:
the undersigned, Hagan & Cushing Co.,
a corporation organized and existing under the laws of the State of Idaho,
a partnership consisting of
an individual trading as
of the city of Moscow, Idaho,

hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the Schedules and agrees upon receipt of written notice of the acceptance of this bid within 15 days (60 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bid as accepted, and to give bond, if required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 20 calendar days.....per cent; 30 calendar days.....per cent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.)

HAGAN & CUSHING CO
(Full name of bidder)

By: A. E. HAGAN
Title: Sec-Treasurer

C. A. HAGAN — Moscow Idaho
(Witness to signature) — (Full Address)

24-4 [54]

* * * * * * *

Page No. 5

(b) Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid by the Contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the Contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items. (This provision will be included in the contract.)

(c) Bidders are informed that State Taxes are not applicable on purchases by the Federal Government, and should not be included in prices bid.

(d) The standard tax clause which is printed in and forms a part of your bid should not be modified or changed, but you should state on your bid that State Taxes are not included and will not be invoiced as a separate item. [55]

Mr. Casterlin: We offer now as exhibit 13, a copy of "hog regulations series 1, number 1, issued October 29, 1934.

Mr. Green: We make the objection that it is immaterial and doesn't tend to prove or disprove any issue in this case. That it was issued under authority of an unconstitutional, invalid and void statute, and therefore not binding on the defendant.

(argument of counsel)

Mr. Green: I will say this, if the offer is limited to approving the rate of tax and not this so called regulation of the Secretary of Agriculture, then I have no objection. Limited to that, as to the rate of tax.

Mr. Casterlin: That is the purpose of the offer.

The Court: Then you agree, it is admitted with the limitation.

Mr. Casterlin: With the understanding that we had, that exhibits 1 to 12 may be read from at any time during the proceedings, may we have the same understanding [13] as to all the exhibits.

The Court: Yes.

Mr. Casterlin: I offer as exhibit 14, certified copy of certain correspondence between Hagan and Cushing Company and the claims division.

I now offer as exhibit 16, copy of a letter,—first as exhibit 15 certified copy of settlement statement.

I now offer as exhibit 16, copy of letter dated Boise, Idaho, April 14, 1939 addressed by myself to Hagan and Cushing Company.

Mr. Green: Which we concede is a true copy of a letter received and we have no objection to the exhibit.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. 15

United States
(Epluribus)
(Unum)
of America

General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that this is a true transcript, in 4 numbered documents, from the books and proceedings of the General Accounting Office in the following case:

HAGAN AND CUSHING COMPANY

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 29th day of June, in the year 1939, at Washington.

[Seal] R. N. ELLIOTT
Assistant Comptroller General of the United States.

K

General Accounting Office
Form 6a

U. S. Government Printing Office: 1930 [56]

General Accounting Office
Form 2042

CERTIFICATE OF SETTLEMENT

General Accounting Office

Certificate No. US-5921-W
War—Settlements and Claims

Washington, D. C., February 2, 1939.

United States Claim No. COL-0663826 (Orig) (1) (2) (3)

I certify that I have examined and settled the claim(s) of the United States against

Hagan and Cushing Company,
Moscow, Idaho

Debtor

for overpayments made under contracts described below, it appearing (1) that these contracts contain the tax clause relative to the increase or decrease of contract prices as a result of changes, subsequent to the date of opening of bids, in Federal taxes applicable to the supplies to be furnished thereunder, (2) that there was, in effect, a change of applicable Federal taxes, since no payment was made by the contractor of the amount of processing tax applicable to the supplies furnished and the legal liability for payment thereof has been removed by decision of the Supreme Court in United States v. Butler, 297 U. S. 1, and (3) that pay-

ment was made at the bid price for all supplies furnished under the below described contracts. The indebtedness an amount equivalent to the processing tax included in the bid price of supplies furnished, is computed as follows:

Contract No. W-972-qm-704, dated July 22, 1935:
September 1935 accounts of J. McKay

Voucher Number	Invoice No. and Date	Item	Weight Delivered	Weight Taxable	Tax per Pound	Amount of Overpayment
494	8/31/35	Pork hams, fresh	890	890	$.0436	$38.80
		Pork loins	544½	544½	.0486	26.46 (Over)

and find the sum of Two Thousand Two Hundred Eighty-Four — — — Dollars and Sixty-Eight — — — — — — cents is due the United States from the above named debtor(s), to be deposited to the credit of.....

2160606—subsistence of the Army, 1936 $158.92

025016—Emergency Relief, Emergency Conservation Work, War, Civilian Conservation Corps, 1935—March 31, 1937 (O. P. 25-35) 2,125.76

R. N. ELLIOTT
Acting Comptroller General
of the United States
By W. P. BEASLEY

(Posted Feb 6 1939 General Accounting Office)

$2,284.68

U. S. Government Printing Office 16-4781

N. B. This settlement supersedes settlement No. US-5293-W, dated July 14, 1938.

cc: War Department,
Office Chief of Finance,
Washington, D. C.

Debt Card Made
2-6-39
Bmd

RSJ
WL. 1-19-39 CML

Continued:

Contract No. W-972-qm-704, dated July 22, 1935:
September 1935 accounts of J. MacKay

Voucher Number	Invoice No. and Date	Item	Weight Delivered	Weight Taxable	Tax per Pound	Amount of Overpayment	
494	8/31/35	Ham, boiled	21	21	$.0544	$1.14	
		Pigs feet, fr.	55	55	.0042	.23	
		Sausage, liverwurst	25	25	.0239	.60	$ 67.23

Contract No. W-5906-qm-ECW-113, dated July 29, 1935:
September 1935 accounts of J. MacKay

3015	8/28/35	Sausage, bologna	2808½	1263.825	.0243	30.71	
		Sausage, frankfurters	3044	1217.6	.0243	29.59	
		Sausage, liver	1804½	1804½	.0239	43.13	
		Boiled ham	269½	269½	.0544	14.66	118.09

Contract No. W-5906-qm-ECW-103, dated July 24, 1935:
September 1935 accounts of J. MacKay

2989	8/28/35	Pork ham, fr.	1047	1047	.0436	45.65	
		Lard	3400	3400	.0247	83.98	129.63

Voucher Number	Invoice No. and Date	Item	Weight Delivered	Weight Taxable	Tax per Pound	Amount of Overpayment	
Contract No. ER-W-5906-qm-ECW-123, dated August 21, 1935: October 1935 accounts of J. MacKay							
1892	9/30/35	Pork Sausage links	2162	2162	.018	38.92	
		Ham, boiled	206	206	.0544	11.21	
		Headcheese	125	125	.0239	2.99	53.12
Contract No. ER-W-5906-qm-ECW-178, dated October 22, 1935: December 1935 accounts of J. MacKay							
1965	11/30/35	Sausage, liver	891	891	.0239	21.29	
		Headcheese	346	346	.0239	8.27	
		Bacon	5801	5801	.0429	248.86	
		Hams, s. p. smoked	4848	4848	.0463	224.46	502.88

[58]

Contract No. ER-W-5906-qm-ecw-196, dated November 20, 1935:
January 1936 accounts of J. Mackay

Voucher Number	Date of Invoice	Item	Weight Delivered	Weight Taxable	Tax per Pound	Amount of Overpayment	
2086	12/28/35	Sausage frankfurters	4113	1645.2	$.0243	$ 39.98	
		Sausage, bologna	1693	761.85	.0243	18.51	
		Pork sausage, links	3385	3385	.018	60.93	
		Hams, s. d. smoked	4922	4922	.0463	227.89	
		Sausage, liver smoked	150	150	.0239	3.59	
		Bacon	6039	6039	.0429	259.07	
		Lard	3200	3200	.0247	79.04	
		Boiled ham	216	216	.0544	11.75	$700.76

Contract No. W-972-qm-713, dated September 23, 1935:
November 1935 accounts of J. MacKay

323	10/31/35	Pigs feet, fr	108	108	.0042	.45	
		Ham, boiled	93¾	93¾	.0544	5.10	
		Headcheese	9	9	.0239	.22	
		Sausage, frankfurters	488	195.2	.0243	4.74	
		Pork Sausage, bulk	319	319	.018	5.74	
		Pork Sausage, links	1112	1112	.018	20.02	
		Sausage, liverwurst	17½	17½	.0239	.42	36.69

Voucher Number	Date of Invoice	Item	Weight Delivered	Weight Taxable	Tax per Pound	Amount of Overpayment	
Contract No. W-972-qm-702, dated June 24, 1935							
August 1935 accounts of J. MacKay							
817	7/31/35	Pork loins	534	534	.0486	25.95	
		Pork shoulders, fresh	166	166	.0191	3.17	
		Sausage, frankfurters	298	119.2	.0243	2.90	
		Sausage, bologna	183¾	82.6875	.0243	2.01	
		Pork sausage, bulk	92	92	.018	1.66	
		Pork sausage, links	513	513	.018	9.23	
		Boston butts, sm	227	227	.0292	6.63	
		Hams, boiled	63½	63½	.0544	3.45	55.00
							[59]
Contract No. ER-W-5920-qm-ecw-37, dated May 21, 1935:							
July 1935 accounts of J. MacKay							
2422	7/9/34	Ham, sp., sm.	1573	1573	$.0463	$72.83	
		Sausage, bologna	4323	1945.35	.0243	47.27	
		Sausage, frankfurters	8181½	3272.6	.0243	79.52	
		Pork shoulders, fr., hocks on	371	371	.0191	7.09	$206.71

Voucher Number	Date of Invoice	Item	Weight Delivered	Weight Taxable	Tax per Pound	Amount of Overpayment	
Contract No. ER-W-5906-qm-ecw-20, dated April 25, 1935: July 1935 accounts of J. MacKay							
2289	6/12/35	Pork hams, fr.	1133	1133	.0436	49.40	49.40
Contract No. W-5906-qm-ecw-72, dated June 24, 1935: August 1935 accounts of J. MacKay							
3917	6/30/35	Lard	2000	2000	.0247	49.40	49.40
Contract No. W-5920-qm-ecw-546, dated April 22, 1935: June 1935 accounts of J. MacKay							
2093	6/11/35	Hams, s. p. sm.	5709	5709	.0463	264.33	
		Pork shoulders, fresh	2693	2693	.0191	51.44	315.77
					Total Amount Due the United States		$2,284.68

[Endorsed]: 1416-C. Plaintiff's Exhibit No. 15. Admitted Nov. 8, 1939. [60]

(Portion of
PLAINTIFF'S EXHIBIT No. 16)

C-20
Boise, Idaho
April 14, 1939

Hagan and Cushing Company
Moscow, Idaho

Gentlemen:

Demand is hereby made upon you for the immediate payment to the Attorney General of the United States of the sum of $2,284.68, representing the amount of overpayment to you on account of processing taxes applicable to hogs processed by it subsequent to April 1935. A statement of the account is enclosed herewith for your information.

It appears from the correspondence in the file that no compliance with the requests of the office of the Comptroller General of the United States for payment of this item has been made, and it is for that reason that this office is making a formal demand.

We trust that this matter may be adjusted by early payment and without the necessity of further action.

Very truly yours,
JOHN A. CARVER
United States Attorney
By: E. H. CASTERLIN
Assistant U. S. Attorney

EHC/G
Enclosure.

[Endorsed]: (Portion of) Plaintiff's Exhibit No. 16. Admitted Nov. 8, 1939. [61]

Mr. Casterlin: I offer as exhibit 17 certified copy of regulation,—hog regulation, series 1 which also contains order of the secretary and approval of the president.

The Court: We will take a short recess at this time. (admonition to the jury)

11 o'clock A. M.
November 8, 1939

Mr. Green: Now, to plaintiff's exhibit 17 I desire to make the objection that it is a purported [14] copy of regulations issued by the secretary of Agriculture under a void statute and not binding upon the defendant in this action, it is wholly immaterial, neither tending to prove or disprove any issue in this case, further that the document doesn't show that it was in force and effect during the period the various contracts here was executed and performed. Further, if it is offered for the purpose of establishing rates of taxes it is in conflict with plaintiff's exhibit 13 which has been received in evidence. The certificate said that there is annexed a printed copy of T D 4425. It doesn't show or purport to show what period of time the so called regulations were in force and effect, and the rates of taxes set out on page 11 show that they are in conflict with the rates of taxes set out on page 7 of exhibit 13 in a number of instances, there is a variation in the rate of taxes, and exhibit 13 does not show the period of time it purports to cover.

(Argument of Counsel)

The Court: You offer that on the basis of determining the computation of the amount?

Mr. Casterlin: Yes sir.

The Court: Not for any other purpose?

Mr. Casterlin: Exhibit 13 is the hog regulation number 1, number 17 is in conformity with 13 and as a result of the two we come to number 15 which is a comput- [15] ation of taxes made pursuant to these two.

The Court: He is limiting the offer to the computation of taxes and not for any other purpose, so exhibit 15 and 17 is in the same situation as exhibit 13.

Mr. Green: I object to exhibit 15 which purports to be a computation apparently made by the Government of the amount of taxes due on the various items-due on the various items included in the contracts on the ground that it is a self serving declaration and neither tends to prove or disprove any issue in this case. It is certified as being a true transcript from the books and proceedings of the General Accounting office in the following case, Hagan and Cushing Company, and has not been identified by the person who made the computation, he is not here for cross examination, and it is wholly immaterial and self serving.

The Court: We have a statute in relation to this objection as to a public document, records of the Government. The statute is very clear, I will have

to overrule your objection on that, Now, as to whether there is a conflict between 13 and 17.

(argument of counsel)

The Court: Examining these exhibits and also exhibit 15, I find that it informs the defendant here [16] of the rate and it gives the dates the rates were in effect. So on that objection I will have to overrule you.

Mr. Green: Exhibit 14, I have no objection.

The Court: Then it will be admitted, that takes care of them. What is next.

Mr. Casterlin: They are all admitted, that is all, the Government rests.

Mr. Greene: Comes now the defendant Hagan and Cushing Company under 50 of the revised rules and moves the Court for a directed verdict upon the ground that the plaintiff has failed to offer any evidence to establish this portion of the allegations of paragraph 2 of their complaint which reads: "Defendant delivered the supplies pursuant to the contracts and plaintiff paid to the defendant the full prices bid, which included amounts for which defendant was liable under the supposed authority of the agricultural Adjustment Act for processing taxes levied by that act on the products furnished by defendant to plaintiff." And that allegation being denied it was incumbent upon the Government to establish by evidence that the bids made by Hagan and Cushing Company which were the amounts paid by the

Government to Hagan and Cushing Company, actually included some items of amount which was or constituted processing taxes.

(remarks) [17]

The Court: The motion for directed verdict presents a question of issue of fact under the pleadings, in which the defendant asserts that the plaintiff has not proven that the supposed processing tax, which plaintiff contends they had paid to the defendant, was included in the amount paid by the Government. The complaint alleges in paragraph 2, "the defendant delivered the supplies pursuant to the contracts and plaintiff paid to the defendant the full prices bid, which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by the Act on the products furnished by the defendant to plaintiff." The defendant in its answer denies that allegation and specifically alleges that the bid price did not include the processing tax in any amount whatever. There is no evidence relating to the issue unless the statement contained in the supposed contract that: "prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid." can be taken as binding on the defendant.

Defendant says the supposed contracts, which contain the provision or term referred to, are void, as they were made under the supposed provisions

of the Agricultural Adjustment Act, held by the Supreme Court to be unconstitutional,—which the Government asserts is so,—then being void as to the processing tax, can the provision or term in the [18] supposed contract relating to what the price bid includes be asserted against the defendant, and the remaining provisions of the contract be held void as contended for by the Government, as there was not in existence any processing tax at all. If there was no such tax in existence at the time the contract were made, then any provisions stated or set forth therein relating to the prices bid including such tax would be void, because we cannot strike out all of the provisions of the contract except this material one and hold that it is valid as to one of the parties to the contract. The provisions attempted to be upheld cannot be regarded as against one of the parties, that provision being one which relates to the taxes which were held not to be in existence. It is merely a statement as to a tax not in existence, and as counsel for the defendant pointed out, nowhere is the amount of the supposed tax shown, but the provision referred to was; "prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid". Under the contention here, there being no such tax, the Supreme Court having held this Act unconstitutional, then this supposed processing tax cannot be applicable.

I can only reach the conclusion that this contract which was made under this Act, which was held un-

constitutional is void,—and to say that this provision which the Government now says is sufficient proof to show that the processing [19] tax is included in the bid is binding here would be inconsistent. If we can take that provision out and say it is binding and hold the remaining portion of the contract invalid,—no, gentlemen, I cannot say that. It says that it shall include a tax which was not in existence. The Government argues this statement is an admission on the part of the defendant. You cannot make an admission of something that never existed. We are trying to say because there is a statement in the supposed contract regarding this tax which was held to have never been in existence would be an admission and binding on the defendant. Under this state of facts I will have to sustain the motion for a directed verdict.

[Endorsed]: Filed February 21, 1940. [20]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
NOVEMBER 8, 1939

* * * * *

The defendant's counsel moved the Court to direct the jury to return a verdict for the defendant. The motion was argued before the Court by respective counsel.

After due consideration, the Court announced his conclusions on the motion and granted the same. [21]

* * * * *

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the above named plaintiff, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered in this action on November 8, 1939, and from the whole thereof.

JOHN A. CARVER
United States Attorney for the District of Idaho
E. H. CASTERLIN
Ass't U. S. Attorney for the District of Idaho
PAUL S. BOYD
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed February 7, 1940. [22]

[Title of District Court and Cause.]

STIPULATION CONCERNING EXHIBITS 13 and 17

For the purpose of the record on appeal in this matter,

It Is Hereby Stipulated and Agreed that Exhibit No. 13, admitted in evidence, is a bulletin entitled "Hog Regulations, Series 1, No. 1", issued

October 29, 1934, by the Agricultural Adjustment Administration; and, that Exhibit No. 17, admitted in evidence, is a bulletin entitled, "Misc. T. D. 4425; that the two exhibits contain the definitions and tax schedules from which the amount of taxes alleged to be included in the purchase price of the commodities is based and by means of which the said alleged taxes are computed, and the proclamations and orders putting the same into effect; and that for the purposes of the record on this appeal, this stipulation may be included and printed in lieu of the two said exhibits, which said original exhibits may be forwarded by the clerk of the trial court to the appellate court for purposes of reference and verification.

JOHN A. CARVER
United States Attorney for the District of Idaho
E. H. CASTERLIN
Ass't U. S. Attorney for the District of Idaho
PAUL S. BOYD
Assistant U. S. Attorney for the District of Idaho. [62]
MAURICE H. GREENE
Attorney for Defendant.

[Endorsed]: Filed February 17, 1940. [63]

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS.

Filed July 6, 1939

Comes now the defendant above named and respectfully moves to dismiss the above entitled action for failure of the complaint on file herein to state a claim upon which the relief sought can be granted.

Defendant further moves the court for an order requiring plaintiff to make a more definite statement of the cause or causes of action sued upon or for a bill of particulars as follows:

A more definite statement of the terms and conditions of the contracts between the United States Government and the defendant, a portion of which said contracts is quoted in paragraph numbered (1) in said complaint.

Said motion for a more definite statement or for a bill of particulars is based upon the affidavit of Maurice H. Greene, Attorney for defendant, attached hereto and made a part hereof.

J. H. FELTON
Residing at Moscow, Idaho.
MAURICE H. GREENE
Residing at Boise, Idaho.
Attorneys for defendant. [64]

[Title of District Court and Cause.]

AFFIDAVIT OF MAURICE H. GREENE
(Attached to foregoing Motion)

State of Idaho
County of Ada—ss.

Maurice H. Greene, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the defendant Hagan and Cushing Company in the above entitled action; that he has made investigation relative to the facts concerning the causes of action sued upon in the complaint on file herein and that the statements made herein are true to the best of his belief and knowledge.

The cause of action sued upon by the United States Government is for recovery of processing taxes allegedly paid by the United States Government to the defendant as a part of the purchase price of meats and meat products sold by the defendant to the Civilian Conservation Corps; that there are twelve separate contracts constituting the cause of action set forth in plaintiff's complaint. A list of the contracts and their respective dates being set forth in paragraph numbered (3) of said complaint; that the defendant had copies of said contracts at the time of their execution but that its records were destroyed in a fire at Moscow, Idaho, on August 20, 1936; that since said date defendant has endeavored to secure copies of said contracts from the office of the Comptroller General of the

United States in Washington, D. C., and in the office of the Department of [65] War at Washington, D. C., but has been unable to secure full and complete copies of said contracts.

That as set forth in paragraph numbered (1) in plaintiff's complaint, affiant understands that each of said contracts contained the provision—

> "Prices paid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid."

Affiant is informed and believes that each of said contracts carried a provision excepting from the above quoted provision contracts relative to the sale of products to the Civilian Conservation Corps, and that the defense in this said action will be that the meat products sold to the Civilian Conservation Corps at the price stated in the contracts was without any processing tax being included therein and that in order for defendant to make said defense it is necessary that the defendant be informed whether all of the written contracts involved in said action contained a provision which permitted this defendant to sell said meat products to the Civilian Conservation Corps without including in the contract price the processing tax for meat products. That without such information as to the whole of said contracts defendant cannot prepare a defense hereto for the reason that defendant does not know without being informed of the nature and contents of each of said contracts whether they and

each of them contained the provision excepting goods sold the Civilian Conservation Corps from the operation of that portion of the contracts set forth in paragraph numbered (1) of plaintiff's complaint.

MAURICE H. GREENE

Subscribed and sworn to before me this 5th day of July, 1939.

[Seal] S. E. BLAINE
Notary Public for Idaho, Residing at Boise, Idaho.

My Com. Exp. May 5, 1942.

[Endorsed]: Filed July 6, 1939. [66]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF SEPTEMBER 1, 1939

The defendant's motion to dismiss the complaint and motion for a bill of particulars came on for hearing, Maurice H. Greene, Esquire, appeared for the defendant and E. H. Casterlin, Assistant District Attorney, appeared for the plaintiff.

Counsel for the defendant stated that the District Attorney had lodged with the Clerk certified copies of the contracts involved and that in view of that fact the motion for a bill of particulars would be withdrawn.

The motion to dismiss was argued before the Court by respective counsel, and was by the Court taken under advisement. [67]

[Title of Court and Cause.]

ORDER DENYING MOTION TO DISMISS

In harmony with written opinion filed in the above entitled cause this date, it is hereby Ordered that the defendant's motion to dismiss is denied.

Dated September 29, 1939.

CHARLES C. CAVANAH
District Judge.

[Endorsed]: Filed September 29, 1939. [68]

[Title of District Court and Cause.]

STIPULATION CONCERNING
EXHIBITS 1 TO 12, INCLUSIVE.

For the purpose of record on appeal in this matter,

It Is Hereby Stipulated By and between the respective parties herein that exhibits numbered 1 to 12, inclusive, received in evidence on the trial of the above entitled cause are the twelve contracts entered into by plaintiff and defendant referred to in Paragraph III of plaintiff's complaint on file

herein and that each of said exhibits contain the following documents:

1. Certificate of award to Hagan and Cushing Company.
2. Contract specifications.
3. Bid of Hagan and Cushing Company accepted by the United States of America.
4. Purchase order of the United States of America.
5. Delivery order of the United States of America.
6. Voucher or claim for payment by Hagan and Cushing Company to the United States of America.
7. Cancelled check of the United States of America issued to Hagan and Cushing Company for payment in the amount of the voucher or claim for payment. [75]

That the bid of Hagan and Cushing Company on the several items in each of the twelve contracts is identical in form except for items, prices bid, and quantities, as the bid under the contract admitted in evidence as Exhibit No. 1, being the contract dated July 22, 1935, No. W-972-QM-704, referred to in Paragraph III of plaintiff's complaint, and which bid has been included in the record on appeal in full herein; that this stipulation may be included and printed in the record herein, and that said original exhibits may be forwarded by the Clerk of the trial court to the appellate court for

the purpose of reference and verification of the matters and things set forth herein.

MAURICE H. GREENE
J. H. FELTON
Attorneys for Defendant
Hagan and Cushing Company.
JOHN A. CARVER
United States District Attorney for the District of Idaho.
E. H. CASTERLIN
PAUL S. BOYD
Assistant United States Attorneys for the District of Idaho.

[Endorsed]: Filed Feb. 24, 1940. [76]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing and typewritten pages numbered 1 to 76, inclusive, to be true and correct copies of the originals on file in the Clerk's office of the papers and proceedings in

the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, and the same constitutes the record on appeal as designated by the appellant and appellee.

I Further Certify That the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of $21.50, and of that sum the appellant has paid the sum of $16.10, and the appellee the sum of $5.40.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 27th day of February, 1940.

[Seal] W. D. McREYNOLDS
Clerk.

[Endorsed]: No. 9459. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Hagan and Cushing Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Central Division.

Filed February 29, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

#9459

UNITED STATES OF AMERICA,

Appellant,

vs.

HAGAN AND CUSHING COMPANY,

Appellee.

STATEMENT OF POINTS UNDER RULE 19, AND DESIGNATION OF RECORD.

Comes Now the above named appellant and files its statement of points on which it will rely on the appeal in this matter and its designation of record.

STATEMENT OF POINTS

I.

The court erred in granting defendant's motion for a directed verdict.

II.

The judgment entered herein is contrary to law.

III.

The judgment is not sustained by and is contrary to the evidence in the following respects.

(a) The evidence conclusively shows that the full prices bid by the defendant in each instance included the amount of processing taxes levied under the supposed authority of the Agricultural Adjustment Act of May 12, 1933, as amended.

(b) The evidence conclusively shows that the full prices bid by the defendant were paid by the plaintiff to the defendant.

(c) The evidence conclusively shows that the defendant has not paid the plaintiff the amount of said taxes.

(d) The evidence conclusively shows that the plaintiff is entitled to recover from the defendant the said amount of money for processing taxes, with interest and costs, in conformity with the prayer of plaintiff's complaint.

DESIGNATION OF RECORD

That part of the record necessary for the consideration of the foregoing points are as hereinafter designated, pages referring to clerk's transcript:

		Pages
1.	Complaint	3-4
2.	Answer	5-6
3.	Judgment	8-9
4.	Reporter's transcript	11-20
5.	Minutes of November 8, 1939	21
6.	Exhibit No. 1	27-28-a; 69-72
7.	Exhibit No. 2	29-31
8.	Exhibit No. 3	32-34
9.	Exhibit No. 4	35-37
10.	Exhibit No. 5	38-40
11.	Exhibit No. 6	41-43
12.	Exhibit No. 7	44-45

JOHN A. CARVER
United States Attorney for the District of Idaho
E. H. CASTERLIN
Ass't U. S. Attorney for the District of Idaho
PAUL S. BOYD
Ass't U. S. Attorney for the District of Idaho.
Attorneys for Appellants.

Service of the foregoing by receipt of copy thereof this 28th day of February, 1940, is hereby acknowledged.

MAURICE H. GREENE
Attorney for Appellee.

[Endorsed]: Filed March 1, 1940. Paul P. O'Brien, Clerk.

No. 9459

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HAGAN AND CUSHING COMPANY,

Appellee

On Appeal From the District Court of the United States For the District of Idaho

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
F. E. YOUNGMAN,
Special Assistants to the Attorney General.
JOHN A. CARVER,
U. S. Attorney for Idaho,
Boise, Idaho

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 9459

UNITED STATES OF AMERICA,

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U. S. Attorney for Idaho,
Boise, Idaho

Filed_____, 1940

_____, Clerk

INDEX

CITATIONS

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 9459

UNITED STATES OF AMERICA,

Appellant

v.

HAGAN AND CUSHING COMPANY,

Appellee

On Appeal From the District Court of the United States For the District of Idaho

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Idaho, denying the appellee's motion to dismiss, is reported at 29 F. Supp. 564. The unpublished oral opinion of the same court, granting the appellee's motion for a directed verdict in its favor, is printed in the record at pages 72 to 74, inclusive.

JURISDICTION

The judgment of the District Court was entered on November 8, 1939. (R. 7-8.) Notice of appeal was

filed on February 7, 1940. (R. 75.) The transcript of record was filed and the cause docketed in this Court on February 29, 1940. (R. 84.) The jurisdiction of this Court is invoked under the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

On various dates subsequent to the enactment of the Agricultural Adjustment Act and the imposition thereunder of processing taxes upon hogs, and while such processing taxes still were in effect, the appellee entered into certain contracts with the United States Government under which it agreed to furnish to various agencies of the Government certain supplies, including pork and pork products, at prices fixed by bids submitted by the appellee and accepted by the Government. Each such contract stipulated, among other things, that the prices bid therein included any federal tax theretofore imposed by Congress which was applicable to the materials covered by the bid. The Government paid to the appellee the full contract price for the supplies furnished, including the pork and pork products, but the appellee did not pay the processing tax applicable to such pork and pork products.

The only question presented by this appeal is whether, by reason of the appellee's failure to pay processing taxes, the Government is entitled to recover from the appellee that portion of the contract price paid by it to

the appellee which represented the unpaid processing tax upon pork and pork products purchased under the contracts.

STATUTE INVOLVED

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20, 24:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (U.S.C., Title 31, Sec. 71.)

STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Idaho (R. 7-8) in an action brought by the United States to recover from the appellee the sum of $2,284.68 (R. 2-5).

On various dates between April 22, 1935, and November 20, 1935, the appellee, a company having its place of business at Moscow, Idaho, entered into certain contracts with the United States Government under which it agreed to furnish certain supplies to various agencies of the Government. These supplies included pork and pork products. The prices of the supplies

furnished by the appellee were fixed by bids duly submitted by the appellee and accepted by the Government. (R. 2-3, 5.)[1]

Each of the contracts entered into by the parties during the period in question stipulated that "Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid." (R. 14, 23, 26, 30, 34, 37, 40, 44, 47, 50, 53, 57.) These contracts further provided that if any sales tax, processing tax, adjustment charge, or other tax or charges were imposed after the date set for opening the bids, and were made applicable directly upon the production, manufacture, or sale of the supplies covered by the bid, and were paid by the contractor, the prices named in the contract were to be increased or decreased accordingly. (R. 14, 23, 26-27, 30, 34, 37-38, 40-41, 44, 47, 50, 53-54, 57.)

The appellee delivered the supplies contracted for by the Government, and the Government paid to the appellee the full contract price for such supplies. (R. 3, 5.)

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[1] Copies of the contracts entered into by the parties, together with copies of other documents showing purchases of the supplies specified therein and payment therefor by the Government, were introduced in evidence. (R 9-11.) Only portions of the contracts are incorporated in the printed record (R. 12-58), but the original exhibits have been deposited with the Clerk for use by the Court (R. 81-83).

For the month of April, 1935, and months subsequent thereto, the appellee did not pay, and never has paid, the processing tax imposed under authority of the Agricultural Adjustment Act with respect to the supplies furnished to the Government under the contracts entered into by it. (R. 3, 6.)

After the supplies furnished by the appellee, pursuant to the above contracts, had been paid for by the Government, and after the processing tax provisions of the Agricultural Adjustment Act had been invalidated by the Supreme Court[2], the Comptroller General of the United States examined and settled the claims of the Government for excess payments to the appellee under the above contracts. (R. 59-67.) This examination disclosed total overpayments aggregating $2,284.68. (R. 67.) This amount represented unpaid processing taxes upon pork and pork products furnished by the appellee under the above contracts. This amount was computed on the basis of conversion factors established by the Secretary of Agriculture, and tax rates prescribed by the Secretary of the Treasury under authority of the Agricultural Adjustment Act[3]. (R. 57, 69-71, 75-76.)

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[2] *United States* v. *Butler,* 297 U. S. 1.

[3] See appellant's exhibit No. 13, being Hog Regulations, Series 1, No. 1, prescribed by the Secretary of Agriculture under the Agricultural Adjustment Act, and appellant's exhibit No. 17, being Treasury Decision 4425 (published in XIII-1 Cum. Bull. 459 (1934)), prescribed

by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. These exhibits are not printed in the record, but the original exhibits have been filed with this Court pursuant to stipulation of the parties. (R. 75-76.)

Demand was made upon the appellee for repayment of the amount determined by the Comptroller General to be due the United States. (R. 68.) Thereafter this action was instituted on June 13, 1939, to recover the sum of $2,284.68 alleged to be due the United States from the appellee. (R. 2-5.) A motion to dismiss the complaint was filed by the appellee on July 6, 1939 (R. 77), and was denied by the court on September 29, 1939 (R. 81). See 29 F. Supp. 564. The appellee then answered (R. 5-7) and the cause was tried before a jury on November 8, 1939 (R. 7, 9.) At the conclusion of the presentation of the evidence on behalf of the Government (R. 9-70) counsel for the appellee moved for a directed verdict on the ground that the Government had failed to prove that the bid price of supplies covered by the several contracts included any amount of processing tax (R. 71-72). The motion was granted and the jury was directed to return a verdict for the appellee. (R. 72-74.) Judgment for the appellee was entered accordingly. (R. 7-8.)

STATEMENT OF POINTS TO BE URGED

The points upon which the Government relies as a

basis for this appeal are set out in the record at pages 85 and 86. They present only the question whether the court below erred as a matter of law in granting the appellee's motion for a directed verdict and in directing the jury to bring in a verdict for the appellee.

SUMMARY OF ARGUMENT

The court below erred in directing the jury to return a verdict for the appellee on the theory that the evidence failed to show that the prices for pork and pork products agreed to in the respective contracts, and paid by the Government, did not include the processing tax upon such products theretofore imposed under authority of the Agricultural Adjustment Act. Such taxes were in effect at the time the contracts were entered into and clearly were intended by the parties to be included in the bid prices submitted by the appellee and accepted by the Government.

The fact that the taxing provisions of the Agricultural Adjustment Act were held to be unconstitutional after the products in question had been contracted for, delivered by the appellee and paid for by the Government, cannot affect the understanding of the parties at the time of execution of the contracts that the prices agreed to therein included any federal tax theretofore imposed. That understanding, together with the further agreement that the contract price would be adjusted to reflect any future increase or decrease in federal taxes, is to be construed only as a protection of the contractor's

margin of profit. If the contractor fails to pay those federal taxes contemplated by the contract with respect to the supplies covered by the contract he is not entitled to collect from the Government that part of the contract price representing such unpaid federal taxes. If the amount representing unpaid federal taxes applicable to supplies purchased is paid to the contractor such payment is in excess of the contract price contemplated by the parties, is illegally paid by officers of the Government, and can be recovered in an action for money had and received.

ARGUMENT

I

THE EVIDENCE CLEARLY ESTABLISHES THAT THE PRICE PAID BY THE GOVERNMENT FOR PORK AND PORK PRODUCTS INCLUDED AN AMOUNT REPRESENTING PROCESSING TAX

The appellee's motion for a directed verdict (R. 71-72) was based upon the ground that the Government failed to offer any evidence that the bids made by the appellee, which were the amounts paid by the Government for the supplies in question, "actually included some items of amount which was or constituted processing taxes." (R. 72.) The court agreed with the

appellee's contention in this respect. (R. 72-74.) In so deciding we submit the court committed error.

In discussing the Government's evidence the court said there was no evidence that the bid prices paid by the Government included processing taxes unless the appellee is bound by the stipulation in each of the several contracts that (R. 14, 23, 26, 30, 34, 37, 40, 44, 47, 50, 53, 57):

> Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid.

Language could not be clearer. There is no justifiable reason for holding that this provision of the contracts does not mean what it says.

In addition to the foregoing statement appearing in each of the contracts involved, it was shown that the contracts all were entered into between April 22, 1935, and November 20, 1935.[4] It also was shown that the processing tax upon hogs imposed under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, became effective November 5, 1933,[5] and the rate of tax which was in effect

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[4] This is shown by the contracts introduced in evidence (appellant's exhibits Nos. 1 to 12, inclusive) and by the allegations of paragraph 1 of the complaint (R. 2-3) admitted in the answer (R. 5).

[5] Plaintiff's exhibits Nos. 13 and 17.

during the period covered by the contracts was shown.[6] The contracts introduced in evidence[7], together with the documents and papers relating to each contract, show the kind and quantity of pork and pork products purchased from the appellee, the month for which furnished, the contract price, and payment of the full price agreed upon.

In view of all the facts the court below clearly was in error in holding that there was no evidence to show that the price paid by the Government for articles purchased from the appellee did not include any amount representing processing tax.

The ruling of the court below (R. 72-74) appears to be based upon the fact that the taxing provisions of the Agricultural Adjustment Act subsequently were invalidated by the Supreme Court in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 694. Because the statute under which the tax was imposed was held unconstitutional the court takes the position that there never was a processing tax and for that reason it cannot be said that any processing tax was

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[6] Plaintiff's exhibit No. 17. The processing tax continued in effect until the taxing provisions of the Agricultural Adjustment Act were declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 694.

[7] Plaintiff's exhibits Nos. 1 to 12, inclusive.

included in the bid prices covered by the contracts. By some process of reasoning the court appears to arrive at the conclusion that the contract as a whole, and particularly the statement that the bid prices include any federal taxes theretofore imposed, is void merely because the taxing provisions of the Agricultural Adjustment Act were declared invalid. (R. 73-74.)

There is absolutely no reason for treating the contracts, or any provision in them, as invalid merely because the taxing provisions of the Agricultural Adjustment Act were held invalid later. The parties have never treated the contracts as invalid in any particular. On the other hand, they were treated as entirely valid in every respect.

That the validity of the contracts involved in this case was not affected by the invalidity of the taxing provisions of the Agricultural Adjustment Act is demonstrated by the decision of the Court of Claims in *Batavia Mills* v. *United States,* 85 C. Cls. 447. In that case the the plaintiff entered into a contract with the Government on April 10, 1933, which was prior to the enactment of the Agricultural Adjustment Act, under which it contracted to furnish one million yards of khaki cotton shirting at a stipulated price per yard. Like the contracts here involved, that contract stated that the contract price included federal taxes, and that if any change in the amount of such taxes was made by Congress after the opening of the bid the contract price should be adjusted accordingly. A processing tax upon cotton therefore

was imposed under the Agricultural Adjustment Act, and the Court of Claims held that the company was entitled to recover an amount representing the additional cost of materials to it as a result of the imposition of the tax. The fact that processing tax had been declared unconstitutional did not affect the contractual rights and obligations of the parties.

Nor can it be said that the prices bid by the appellee did not include any processing tax merely because the processing tax later was held invalid. At the time the contracts were entered into the processing tax upon hogs was in effect. At that time it constituted a very definite liability. Moreover, these contracts must be deemed to have been made in the light of existing law[8]. This is true even though the law later was held invalid. In *Chicot County Drainage Dist.* v. *Baxter State Bank* (No. 122, October Term, 1939, decided January 2, 1940), the Supreme Court of the United States was dealing with the effect of a District Court decree entered under a federal statute which later was held to be unconstitutional in another proceeding. In discussing the effect of the

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[8] Compare *Abilene Nat'l Bank* v. *Dolley,* 228 U. S. 1, 5; *Southern Surety Co.* v. *Oklahoma,* 241 U. S. 582, 587; *Connecticut Mut. Life Ins. Co.* v. *Cushman,* 108 U. S. 51, 64, 65; *Wilson* v. *Rousseau,* 4 How. 646, 685; *Bronson* v. *Kinzie,* 1 How. 311, 319; *Ogden* v. *Saunders,* 12 Wheat. 212, 257-258.

statute prior to the determination of its invalidity the Court said:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton* v. *Shelby County,* 118 U. S. 425, 442; *Chicago, Indianapolis & Louisville Rwy. Co.* v. *Hackett,* 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, or prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-

inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

The purpose of the tax provisions of these contracts, when considered as a whole, was to protect the contractor's margin of profit. Cf. *United States* v. *Glenn L. Martin Co.,* 308 U. S. 62. There is no basis for assuming, contrary to the express stipulation in the contracts, that the appellee did not take into account the then existing processing tax in submitting bids for the supplies which it proposed to furnish.

The determination of the court below that the bid prices of pork and pork products set out in the contracts in question did not include any amount representing processing tax is not supported by any evidence, and is contrary to the evidence. The court's action in directing the jury to return a verdict for the appellee on the basis of that determination is erroneous and should be set aside.

II

THE GOVERNMENT IS ENTITLED TO RECOVER THE AMOUNT OF UNPAID PROCESSING TAX INCLUDED IN THE PRICES IT PAID THE APPELLEE FOR PORK AND PORK PRODUCTS

The appellee admits that it did not pay any processing taxes under the Agricultural Adjustment Act with respect to the pork and pork products furnished to the Government under the contracts involved in this action.

(R. 3, 6.) If, as we believe, the evidence fully establishes that an amount representing unpaid processing taxes upon such products was included in the price paid by the Government for such products, it would seem to follow that the opinion of the court below[9] denying the appellee's motion to dismiss is determinative of the Government's right to recover in this action.

It is the contention of the Government that the contracts entered into by the parties contemplated the payment of the stipulated prices, which included the processing taxes imposed under authority of the Agricultural Adjustment Act, and that by reason of the failure of the appellee to pay such processing taxes to the Government there has been an excessive and illegal payment to the appellee which it is bound to repay.

The Government cannot be bound by the illegal acts of its officers in paying out its moneys, and money paid out erroneously or without authority of law can be recovered from the recipient in an action for money had and received. *Wisconsin Central R'd* v. *United States,* 164 U. S. 190; *Sutton* v. *United States,* 256 U. S. 575.

That the contracts entered into between the appellee and the Government did not contemplate payment of the full bid price where the appellee failed to pay any federal taxes included therein appears to be clear from the recent decision of the Supreme Court of the United

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[9] 29 F. Supp. 564.

States in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62. In that case the company entered into a contract in 1934 to furnish certain supplies to the War Department. The contract contained a tax clause substantially identical with the tax provisions of the contracts involved in this case[10], including the provision that if any sales tax, processing tax, adjustment charge, or other taxes or charges were imposed or changed by the Congress subsequent to the date of the contract and made applicable directly upon production, manufacture, or sale of the supplies called for by the contract, and were paid by the contractor on the articles furnished under the contract, then the stipulated price was to be increased or decreased accordingly. Taxes thereafter were imposed upon the company under the Social Security Act, c. 531, 49 Stat. 620, and the narrow question at issue was whether such taxes were of the type for which the contract provided extra compensation. In deciding the question the Court had occasion to consider the purpose of this provision in Government contracts. It said (p. 64):

> Obviously, the seller fixed its stipulated prices so as to provide a margin of profit over federal taxes for which it might at the time of the contract be responsible on the particular "material" sold. This clearly appears from the governing provision's opening declaration that "the prices herein stipulated

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[10] R. 14, 23, 26-27, 30, 34, 37-38, 40-41, 44, 47, 50, 53-54, 57.

include any Federal tax heretofore imposed by Congress which is applicable to the material called for under the terms of this contract." But, without more, future increases in federal taxes "applicable to the material" might have substantially affected the margin of profit which the contract was calculated to insure. Against the contingency of increase in federal taxes applicable to the "material" purchased, the Government undertook to compensate the seller for payment of future federal taxes "on the articles or supplies contracted for" should Congress levy any sales tax, processing tax or other tax "applicable directly upon production, manufacture or sale of the articles * * * contracted for * * *."

This construction is controlling here. The purpose of the tax provisions incorporated in these contracts was intended to protect the appellee's estimated margin of profit. But they did not contemplate the realization of a greater profit on account of the appellee's failure to pay the taxes included in its bid price.

That the contracts contemplated payment of the contract price only when the federal taxes included therein actually were paid to the Government is further illustrated by the further provision in each tax clause that the contract price would be increased if thereafter any taxes or charges were changed or new taxes were imposed

"and are paid by the contractor."[11] This provision evidences an intention that existing taxes must likewise be paid or an appropriate credit given the Government on the contract price.

The payments made by the Government were excessive and were illegally made. The Government is entitled to recover this excess. Cf. *Wisconsin Central R'd* v. *United States, supra; Sutton* v. *United States, supra.*

The purpose of the tax provisions in Government contracts as exemplified by the decision in *United States* v. *Glenn L. Martin Co., supra,* the fact that the taxes in question are payable to the Government, which is the party making payments under the contracts, and the fact that the Government is entitled to recover money erroneously or illegally paid out by one of its officers, all serve to distinguish this case from that large group of suits between individuals where a vendee seeks to recover from his vendor on account of the vendor's failure to pay a tax, the burden of which was shifted to the vendee. *Moundridge Milling Co.* v. *Cream of Wheat Corp.,* 105 F. (2d) 366 (C.C.A. 10th); *Continental Baking Co.* v. *Suckow Milling Co.,* 101 F. (2d) 337 (C.C.A. 7th); *Cohen* v. *Swift & Co.,* 95 F. (2d) 131 (C.C.A. 7th), certiorari denied, 304 U. S. 561; *Johnson* v. *Igleheart Bros.,*95 F. (2d) 4 (C.C.A.7th); *Golding Bros. Co.* v. *Dumaine,* 93 F. (2d) 162 (C.C.A. 1st); *Casey Jones,*

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[11] R. 14, 23, 27, 30, 34, 37, 40, 44, 47, 50, 54, 57.

Inc. v. *Texas Textile Mills,* 87 F. (2d) 454 (C.C.A. 5th); *Johnson* v. *Scott County Milling Co.,* 21 F. Supp. 847 (E.D. Mo.); *O'Connor-Bills* v. *Washburn Crosby Co.,* 20 F. Supp. 460 (W.D. Mo.); *Heckman & Co.* v. *I. S. Dawes & Son Co.,* 12 F. (2d) 154 (App. D.C.). Compare *Wayne County Produce Co.* v. *Duffy-Mott Co.,* 244 N.Y. 351, 155 N.E. 669.

The decision in such suits between individuals always depends upon the contractual arrangement between the parties. The governing principles are stated in *Casey Jones, Inc.* v. *Texas Textile Mills, supra,* where the court said (p. 456):

> In sales of this kind, if the price agreed upon is understood by the parties to exclude the tax, and the buyer agrees to put the seller in funds for payment thereof, and later the seller is relieved of the duty of paying the tax, the buyer is entitled to recover the amount paid in excess of the price. *Wayne County Produce Co.* v. *Duffy-Mott Co.,* 244 N. Y. 351, 155 N.E. 669. However, if there be no agreement concerning the tax, no such right accrues to the buyer, even though the price paid includes a tax erroneously believed by the seller to be due.

The appellee no doubt will rely upon the decision of the Court of Claims in *Ismert-Hincke Milling Co.* v. *United States,* not officially reported but published in 1939 Prentice-Hall, Vol. 1, ¶ 5.653, which involves substantially the same question, and was decided on Novem-

ber 6, 1939. In the light of the foregoing discussion, however, we submit the Court of Claims erred in failing to observe the suggested distinction, and, therefore, its decision should not be followed here.

Since the contracts involved in the instant case contemplated payments to the appellee which would guarantee its estimated profit after payment of federal taxes theretofore imposed the Government is entitled to recover that portion of each payment which represents processing tax which the appellee did not pay.

CONCLUSION

The decision of the court below is wrong. It is not supported by the facts and the law, and should be reversed.

Respectfully submitted,

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Assistant Attorney General.
SEWALL KEY,
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Special Assistants to the
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JOHN A. CARVER,
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APRIL, 1940.

Service of the foregoing this_____day of April, 1940, is hereby acknowledged.

Counsel for Appellee

No. 9459

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HAGAN AND CUSHING COMPANY,

Appellee

On Appeal From the District Court of the United States For the District of Idaho

BRIEF FOR HAGAN AND CUSHING COMPANY

MAURICE H. GREENE,
Residence: Boise, Idaho.
J. H. FELTON,
Residence: Moscow, Idaho.
Counsel for Appellee.

Filed....., 1940

....., Clerk.

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BRIEF FOR HAGAN AND CUSHING COMPANY

JURISDICTION

Appellee concedes jurisdiction of the Court to entertain this appeal.

STATEMENT OF THE CASE

On June 13, 1939, the United States of America instituted this action against the Hagan and Cushing Company in the District Court for the District of Idaho, Central Division, to recover the sum of $2284.68 allegedly paid by appellant to appellee for hog processing taxes. (R. 2-4). To the complaint appellee filed its

motion to dismiss "for failure of the complaint on file herein to state a claim upon which the relief sought can be granted." (R. 77). On September 29, 1939, the Court entered its order denying the motion to dismiss (R. 81), its written opinion being found in 29 Federal Supplement 564. Thereafter appellee filed its answer admitting certain portions of the complaint and denying other portions (R. 5-6), and on November 8, 1939, the cause proceeded to trial before a jury. At the close of the evidence offered by the Government, appellee moved for a directed verdict under Rule 50 of the Revised Rules of Practice (R. 71), which motion was granted by the Court, and thereupon judgment was entered in favor of appellee and against appellant. (R. 7).

The issues framed by the complaint and the answer are comparatively simple. Defendant admitted Paragraph 1 of the complaint, which alleged that between April 22, 1935, and November 20, 1935, defendant entered into a number of contracts with the United States Government for the delivery of certain pork and pork products to the Government, all of which contracts contained the following provision:

> "Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the materials on this bid." (R. 3-5).

Paragraph 2 of the complaint alleged that certain rates of processing tax had been fixed by the Secretary of Agriculture under the supposed authority of the Agri-

cultural Adjustment Act prior to the time the various contracts between the Government and the defendant were entered into and that:

> "Defendant delivered the supplies pursuant to the contract and plaintiff paid to the defendant the full prices bid, *which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that Act* on the products furnished by defendant to plaintiff." (R. 3).

Defendant admitted delivery of the supplies pursuant to the contracts and that the Government paid the prices named therein, but *denied "that the full prices bid included any amounts for processing taxes and alleges that the bid prices did not include processing taxes in any amount whatsoever."* (R. 6). The allegations of paragraph 3 of the complaint were admitted with the exception "that any processing tax in any amount whatsoever was included in the bid price paid by plaintiff to defendant." (R. 6).

Upon the trial of the case the only evidence offered by the Government was a series of exhibits to establish the material allegations of its complaint. The first twelve of these exhibits were certified copies of the twelve contracts for the sale of certain meat supplies by the Hagan and Cushing Company to the Government, each of which contracts contained a paragraph similar to the

following provision quoted from the eleventh contract and which appears on page 50 of the record:

> "Prices bid herein include any Federal Tax heretofore imposed by Congress which is applicable to the materials on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sale of the supplies covered by this bid, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on the vouchers (or invoices) as separate items. (This provision will be included in the contract.)
>
> "Bidders are informed that State Taxes are not applicable to purchases by the Federal Government and should not be included in prices bid."

Exhibit No. 13 was a certified copy of certain hog regulations issued by the Secretary of Agriculture under the supposed authority of the Agricultural Adjustment Act (R. 57). This original exhibit has been certified to this Court.

Exhibit No. 14 was a certified copy of certain correspondence between the Hagan and Cushing Company

and the Claims Division of the Government (R. 58). This exhibit has not been printed in the record.

Exhibit No. 15 was a certified copy of a form of "Certificate of Settlement" of the General Accounting Office, setting up the amount of pork products included in each contract, the amount of alleged processing tax applicable and the amount of the alleged overpayment by the Government to the Hagan and Cushing Company (R. 59-67).

Exhibit No. 16 was a copy of a demand made by the United States District Attorney for the District of Idaho upon the Hagan and Cushing Company for the payment of the sum alleged due in the complaint (R. 68).

Exhibit No. 17 was a certified copy of certain hog regulations issued by the Secretary of Agriculture under the purported authority of the Agricultural Adjustment Act, which original exhibit has been certified to this Court and is not printed in the record (R. 69, 75-76).

Exhibits 13 and 17, taken together, are supposed to establish the rates of processing tax on pork products under the Agricultural Adjustment Act.

The seventeen exhibits having been received in evidence, the Government rested its case (R. 71), and thereupon counsel for the defendant, Hagan and Cushing Company, moved for a directed verdict "upon the ground that the plaintiff has failed to offer any evidence to establish this portion of the allegations of paragraph 2

of their complaint which reads: 'Defendant delivered the supplies pursuant to the contracts and plaintiff paid to the defendant the full prices bid, which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that act on the products furnished by defendant to plaintiff.' And that allegation being denied, it was incumbent upon the Government to establish by evidence that the bids made by Hagan and Cushing Company which were the amounts paid by the Government to Hagan and Cushing Company, actually included some items of amount which was or constituted processing taxes." (R. 71-72).

In sustaining the motion for a directed verdict the trial court held the provision in the contract that the bid prices included taxes theretofore imposed by Congress could not be held to be binding upon the defendant to establish that unconstitutional processing taxes were actually included if the provisions of the contract that the government was to pay certain sums for the purchase of the meat products were not binding upon the government. (R. 72-74). Stated another way, the court held, if the government could repudiate the contract so as to recover the amount of any alleged processing taxes included in the bid prices, then the defendant had the right to submit bids which did not include processing taxes and the clause in the contract reciting that taxes theretofore imposed by Congress were included in the

bid price was not an admission that the unconstitutional tax was, in fact, included in the prices bid. The court thereupon instructed the jury to bring in a verdict for the defendant and from a judgment entered on the verdict so rendered this appeal is taken (R. 75).

POINT I

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AGAINST THE DEFENDANT AND APPELLEE'S MOTION TO DISMISS SHOULD HAVE BEEN SUSTAINED.

SUMMARY OF ARGUMENT

It is settled law that this court reviews only the judgment of the lower court, not the reasons given for the entry of such judgment. In this case the bill of complaint failed to state a cause of action for the reason that the contracts in question show that only lump sum prices were agreed upon by the government and the Hagan and Cushing Company, without segregation of processing taxes, and the contracts contained no provision that the Hagan and Cushing Company would pay to the government any amount of the bid prices in the event the processing taxes were held unconstitutional. In the absence of a clause whereby the seller agreed to pay the purchaser the amount of the unconstitutional tax the purchaser cannot recover and the court should have sustained appellee's motion to dismiss.

Ismert-Hincke Milling Co. vs. U. S. (U. S. Ct. Cl., Decided November 6, 1939).

ARGUMENT

It is a general rule that this Court will affirm a judgment of the District Court if that judgment is correct, irrespective of the ground upon which it may have been granted by the District Judge.

This Court in U. S. vs. Heinrich, 16 Fed. (2d) 112 (113) said:

> "But, while conceding that the complaint states no cause of action, and that the judgment itself is correct, the government insists that it should not hereafter be confronted by an adjudication of the court below, based upon the ground that the earlier act is unconstitutional and void. But this court sits in review of final judgments, not of opinions, and, if the judgment itself is conceded to be correct, we cannot and will not inquire into the reasons assigned therefor. As said by the Supreme Court in Dinsmore v. Southern Express Company, 183 U. S. 115, 121, 22 S. Ct. 45, 47 (46 L. Ed. 111):
>
> " 'As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that is appropriate in view of the act of 1901, we need not consider the grounds upon which that court proceeded, or any of the questions determined by it or by the Circuit Court, and the judgment

must be affirmed without costs in this court; and it is so ordered.' "

The Eighth Circuit lays down the rule as follows:

"This court, however, is not bound by the reasons assigned by the trial court in directing a verdict. A rule to the contrary would call for a reversal of this case. There is no duty devolving upon the trial court in directing a verdict to assign reasons therefor. If for any purpose he sees fit to do so, although his reasons of law or fact are incorrect, it is not error, if upon the record the appellate court finds the verdict was proper."

Smith vs. S. S. Kresge Co., 79 Fed. (2d) 361 (362, 363).

See also:

Clinton Mining Co. vs. Cochran, 247 Fed. 449
Eureka County Bank vs. Clarke, 130 Fed. 325.
Boise Water Co. vs. Boise City, 213 U. S. 276.

In this case, we believe that appellee's motion to dimiss the bill of complaint should have been granted and, irrespective of other grounds for affirming the judgment, this Court should hold that the judgment should be affirmed for the reason stated in appellee's motion to dismiss "for failure of the complaint on file herein to state a claim upon which the relief sought can be granted." (R. 77). Prior to the argument on appellee's motion to dismiss and in response to its motion for a

bill of particulars, the Government filed with the clerk of the court certified copies of the contracts involved so that they were available to the trial court upon the hearing of the motion to dismiss. The contracts disclosed that the bids submitted by the Hagan and Cushing Company and accepted by the Government were lump sum bids, in that no segregation of any processing taxes from the bid prices was made. (R. 15-20). Further, there was no provision in the contracts that the Hagan and Cushing Company would pay the Government any amount, whether for processing taxes or otherwise, in the event the Agricultural Adjustment Act or any other tax act should be held unconstitutional subsequent to the execution of the contracts. In a long series of cases it has been held that where the sales price of the goods is a lump sum or composite price so that any processing tax included in the sales price cannot be segregated therefrom, and in the absence of a provision in the contract that if any tax statute were held unconstitutional the amount of the tax, if any, included in the bid price would be repaid by the seller to the buyer, the buyer cannot recover the amount of any alleged tax claimed to have been included in the sales price.

Cases identical with the instant one, in that they involved actions to recover amounts of processing taxes under the Agricultural Adjustment Act alleged to have been included in the contract price, in which it was held that the buyer could not recover the alleged tax, are

as follows: Moundridge Milling Co. v. Cream of Wheat Corp., 105 F. (2d) 366 (C. C. A. 10th); Continental Baking Co. v. Suckow Milling Co., 101 F. (2d) 337 (C. C. A. 7th); Cohen v. Swift & Co., 95 F. (2d) 131 (C. C. A. 7th), certiorari denied, 304 U. S. 561; Johnson v. Igleheart Bros., 95 F. (2d) 4 (C. C. A. 7th); Golding Bros. Co. v. Dumaine, 93 F. (2d) 162 (C. C. A. 1st); Casey Jones, Inc. v. Texas Textile Mills, 87 F. (2d) 454 (C. C. A. 5th); Johnson v. Scott County Milling Co., 21 F. Supp. 847 (E. D. Mo.); O'Connor-Bills v. Washburn Crosby Co., 20 F. Supp. 460 (W. D. Mo.); Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2d) 154 (App. D. C.)

An excellent statement of the rule is set forth in Cohen v. Swift & Co., supra, as follows:

> "There is no claim that the processing tax was billed to appellant as a separate item, but it is claimed it was included and made a part of the price paid by appellant for the products purchased, and in order to sustain such claim it is alleged that wholesale prices increased when the processing tax was unpaid and decreased when such tax was removed and that the agents and representatives of appellee told appellant and their vendees and customers that the processing tax was included in the purchase price. The bill contains no allegation as to whether such tax included in the price at which it sold the products in question to its vendees; neither

> is any agreement, express or implied, alleged, whereby appellee agreed to pay to appellant and those like situated the tax so imposed."

The District Court in passing on appellee's motion to dismiss distinguished the foregoing cases from the case at bar on the ground that a distinction existed in the Government being a party to a contract rather than a private individual and, while conceding the correctness of the foregoing decisions as applied to contracts between private parties, reached the opposite conclusion where one of the parties was the Government. We see no reason for the distinction made by the District Court, for, as was pointed out in United States v. Helvering, (C. C. A. D. C.) 85 Fed. (2d) 230, the government in seeking to recover taxes stands no higher in this court than a private individual. In the cited case the court said:

> "Obviously this is inequitable and ought not to be done unless required as a matter of law. In saying this much, we are not influenced by the fact that the government is itself a party or that the subject we are dealing with is taxation. The result to be reached should be wholly uninfluenced by those facts. When the United States is properly a party in a litigation in its own courts, it occupies no different or better position than the humblest citizen. Overreaching on its part should be no more condoned than if practiced by an individual. We have

said as much before. O'Laughlin v. Helvering, 65 App. D. C. 135, 81 F. (2d) 269. Impelled by these considerations, we proceed to a discussion of the case as made."

The Attorney General in his brief in this case, the same as the District Court in its memorandum opinion on appellee's motion to dismiss, urges a distinction between the Government as a party to a contract and a private individual. However, two days before the trial of this action on the merits, in a case identical in every respect with the instant case, the Court of Claims of the United States decided the case of Ismert-Hincke Milling Company v. The United States, (decided November 6, 1939, and not yet reported) and there held that in the matter of contracts of this nature no distinction could be made in the right of the Government to recover alleged processing taxes and the right of a private individual. Justice Green, in rendering the unanimous opinion of the Court of Claims, said:

"It is also argued on behalf of the defendant that by reason of plaintiff having failed to pay the processing taxes involved in the six completed contracts there was a want of consideration for the payments made thereon to that extent, and the plaintiff having been paid in full, the Comptroller General rightfully held that there had been an overpayment upon which the amount due on the contracts on which plaintiff brought suit could be

credited. But this contention is negatived by the authorities which hold that where there is but one price fixed by the contract and no separation of the tax, the tax has been absorbed in the price and that the purchaser merely pays the price demanded for the goods. In such cases there can be no implication outside of the terms of the contract. *It should be kept in mind in this connection that the contracts upon which suit was brought contained no provision that the amount of the tax should be refunded to the defendant in event the tax was held unconstitutional or invalid, or for any other reason was not paid by the plaintiff.* The grounds for any change in the price were stated clearly and without ambiguity, leaving nothing to be inferred or implied. While some verbal differences may be found in the terms of the contracts involved in the cases cited to support plaintiff's contentions, these differences do not affect the principle laid down therein or the rules which determine defendant's right to recover."

On the contention urged that a distinction exists between contracts to which the Government is a party and contracts between private individuals, Justice Green said:

"It seems to be considered by the attorneys for the defendant that the fact that the Government was a party to the contracts in suit makes the rule we have laid down above inapplicable, and as a

> basis for the argument made by defendant it is said that in private contracts it is immaterial to the vendee whether the taxes are paid or not. With this statement we do not agree. In all of the cases which we have cited the foundation on which the action was laid was that the tax had not been paid. In our opinion, the fact that the defendant in the case at bar would have received the tax if it had been paid is entirely immaterial."

The Ismert-Hincke case cannot be distinguished from this case. The clauses of the contracts here in question are identical with the clauses in that case. In each instance the seller had not paid the Government any processing tax. In each instance the contracts were fully executed before the decision of the Supreme Court of the United States invalidated the processing tax provisions of the Agricultural Adjustment Act. Therefore, this Court must determine whether it will follow the decision of the Court of Claims in the Ismert-Hincke case or the decision of the District Court below on appellee's motion to dismiss. The decision of the District Court is the only decision of which we are aware (some district court decisions have been reversed on appeal) upholding the right of the buyer to recover the amount of the tax from the seller where no segregation of the processing tax was made from the bid price in the contracts and there was no stipulation in the contract that if the tax statute was held unconstitutional, the

seller would refund the amount of tax to the buyer.

As pointed out above, the Government is in no different situation in this case than a private individual. Its contracts have no greater standing in a court than the contracts of a private individual. Had the Government seen fit to do so, it could have included in the contracts a provision that, if for any reason any tax included in the bid price was held invalid, the amount of such tax would be refunded by the seller to it. In the absence of such a stipulation, we submit that the Government agreed to buy pork products at a certain amount per pound, that it paid exactly the agreed price for such products, that there is no reason now existent for the Government claiming that it paid for something other than meat products, or that it paid at a greater rate than the contract provided for. The District Court's decision on the motion to dismiss that the Government can recover the amount of the processing tax from the seller is at variance with the judgment of practically every Circuit Court in the country as well as the United States Court of Claims, and we submit that its final decision on the merits that the Government cannot recover alleged processing taxes from the seller should have been its decision on appellee's motion to dismiss, and, for that reason, that the judgment of the District Court denying the Government the right to recover should be affirmed.

POINT II

THE PROCESSING TAX PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT BEING UNCONSTITUTIONAL WERE VOID FROM THEIR INCEPTION AND THE CONTRACTS DID NOT PROVE THAT THE VOID TAX HAD, IN FACT, BEEN PAID TO APPELLEE AS A PART OF THE CONTRACT PRICE OF THE GOODS.

SUMMARY OF ARGUMENT

The Government assumed the burden of proving that the bids of the Hagan and Cushing Company did include processing taxes for it alleged in Paragraph 2 of the complaint that the bid prices "included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes * * *" (R. 3). This allegation was denied in defendant's answer. (R. 6).

The Agricultural Adjustment Act, being unconstitutional and of no legal force, did not require the Hagan and Cushing Company in complying with the provisions of the contract "that prices bid herein include any federal tax heretofore imposed by the Congress" to include the void processing tax in the prices bid. This action, conceded by the Government to be an action for money had and received, rests on equitable principles and it was incumbent upon the Government to prove that the Hagan and Cushing Company had in its posses-

sion moneys which in justice and good conscience belonged to the Government. The contracts themselves only refer to applicable taxes and it was incumbent upon the Government to prove that the bid prices did, in fact, include processing taxes. The Government concededly offered no evidence of this nature and in the absence of any evidence that the bid prices did include amounts representing the unconstitutional tax, the Government failed to establish the allegations of its complaint and the judgment of the District Court should be affirmed.

ARGUMENT

A summary of the Government's argument is that defendant did not pay any processing taxes to the Government for pork products sold by it between the months of April and November, 1935; that the Agricultural Adjustment Act was not declared unconstitutional by the Supreme Court of the United States (although there were a large number of district court and circuit court decisions rendered before the decision of the Supreme Court of the United States) until January 6, 1936, (United States v. Butler, 297 U. S. 1, 80 L. Ed. 477, 56 Supreme Court 312, 102 A. L. R. 914), that since the Agricultural Adjustment Act had not been declared unconstitutional by a court of last resort until after the twelve contracts in question had been performed and the bid prices paid, the Hagan and Cushing Company did not have the right to disregard

the provisions of an unconstitutional statute and submit bids to the Government without processing taxes being included; and that the clause in the contract that prices bid included taxes theretofore imposed by Congress is binding upon the defendants that the bid prices did include the unconstitutional processing tax.

The issue in this case is whether the defendant had the right to disregard the unconstitutional Agricultural Adjustment Act before the decision of the Supreme Court of the United States (United States vs. Butler, supra) in submitting bids on the contracts in question. If so, then it was justified in submitting bids without processing taxes being included therein; and in order for the Government to recover in this action it had the burden of establishing as a matter of fact that processing taxes were included in the bid prices. Appellant assumes that from the time of enactment of the Agricultural Adjustment Act in 1933 to the date the Supreme Court rendered its decision in the Butler case on January 6, 1936, the unconstitutional processing taxes were in full force and effect. This appears repeatedly throughout appellant's brief. On page 6 of its brief appellant says: "On various dates subsequent to the enactment of the Agricultural Adjustment Act and the imposition thereunder of processing taxes upon hogs, *and while such processing taxes still were in effect,* the appellee entered into certain contracts with the United States Government * * *"

The Federal Courts have established and followed the rule that an unconstitutional law is invalid from the time of its enactment. In Norton v. Shelby County, 30 L. Ed. 178, 118 U. S. 425, the Supreme Court said:

> "An unconstitutional act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In C. & I. L. Railway Company v. Hackett, 228 U. S. 559, 57 L. Ed. 966, the same Court said:

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

In El Paso Electric Company v. Elliott, 15 Fed. Supp. 81, the Court said:

> "Where a statute, in this instance an act of Congress, is held by the court, as in this instance to be invalid and unconstitutional 'in toto', the act falls, and, in falling, carried with it all remedies or attempted remedies as provided therein, in effect the same as if never enacted or in existence."

The general rule is stated in 16 Corpus Juris Secundum, at page 287, as follows:

> "Generally speaking, a decision by a court of

> last resort that a statute is unconstitutional has the effect of rendering such statute absolutely null and void; the act is as inoperative as if it had never been passed, and it is regarded as invalid from the date of enactment, and not only from the date on which it is judicially declared unconstitutional."

The Government seeks to void the effect of these decisions by citing cases involving rights arising through parties dealing with an unconstitutional statute on the assumption that the statute was in fact constitutional. We do not believe such cases to be authority in the instant proceeding. The provisions in each of the contracts sued upon in this proceeding contain the following provision:

> "Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid."

The quoted provision of the contract did not state that the bid prices included any amounts for the Agricultural Adjustment Act taxes but only for taxes "heretofore imposed by Congress." The processing taxes levied under the Agricultural Adjustment Act being unconstitutional, the contract provision did not require the Hagan and Cushing Company to include processing taxes in its bid, for Congress never legally imposed any Federal tax by the provisions of the Agricultural Adjustment Act. It must follow that the tax clause above quoted was not conclusive that processing tax was in fact

included in the bid prices. Therefore, in order for the Government to recover it had to go farther than the terms of the contracts and show that processing tax was in fact included in the bid prices before it had established that the defendant had received anything more than the sales price of the merchandise. This is patent from the allegations in the Government's complaint in which, irrespective of the contract provisions, it affirmatively alleged that the bid prices "included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes * * *" (R. 3).

The Government in its brief admits that this is an action for money had and received and with that position appellee agrees. It is well established that an action for money had and received is governed by equitable principles. The issue in such a case is: Does the proof show that the defendant has money which in equity, justice and good conscience belongs to plaintiff?

In Crossett Lumber Company v. United States, (8th Cir.), 87 Fed. (2d) 930, it was held:

> "An action to recover taxes is in the nature of an action for money had and received. Although in form it is an action at law, it is governed by equitable principles. (citing cases) *In such an action a plaintiff cannot recover unless he can show that in equity and good conscience he is entitled, as against the defendant, to the money. Such an action*

'aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bono belongs to the plaintiff.' Claplin vs. Godfrey, 21 Pick. (38 Mass.) 1, 6, quoted with approval in the Jefferson Electric Co. Case, supra. In this case the appellant has failed to establish such an equitable right to recover."

In Champ Spring Co. vs. United States, (8th Cir.), 47 Fed. (2d) 1, an action to recover taxes, the court said:

"As has been observed the plaintiff's action is in the nature of a suit for money had and received. While this is in an action at law, it is governed by equitable principles, and it can be maintained only when one has money in his hands belonging to another, which in equity and conscience he ought to pay over to another. The issue in this case is: *To whom does the money in equity, justice and good conscience belong? If the plaintiff fails to show that it has a superior right to that of the defendant, it cannot recover.*"

and

"*It was therefore incumbent upon the plaintiff, to entitle it to recover, to show, not that the defendant had by some illegal method secured these funds, but that the plaintiff had a better right to them than the defendant.*"

In White v. Stone, (1st Cir.), 78 Fed. (2d) 136, the Court said:

> "It is well settled that an action to recover taxes alleged to have been illegally collected is, essentially, an action for money had and received and is equitable in character *and that it devolves upon the plaintiff in such an action to establish that in justice and equity the money sued for belongs to him.*"

The general rule is stated in 41 C. J., at page 68, as follows:

> "The burden is on plaintiff to prove that the money has been received by defendant, or at least some proof must be made from which such an inference can be drawn. So the burden is on plaintiff to show that the money was received for the use of plaintiff and that he is legally entitled to the money."

In Atlantic Coast Line R. Co. v. Florida, 79 L. Ed. 1451, 295 U. S. 301, the Court said:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (citing cases) The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense in equity and good conscience if permitted to retain it. (citing cases) The question no longer is whether the law

would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

In United States v. Jefferson Elec. Mfg. Co., 78 L. Ed. 859, 872, 291 U. S. 386, the Court said:

"The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:

" 'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money which ex aequo et bono belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action.' "

See also:

American Newspapers vs. U. S., 20 Fed. Supp. 385, 393.

White vs. Stone, Collector, (1st Cir.), 78 Fed. (2d) 136.

Hammermill Securities Corp. vs. Noel, 20 Fed. Supp. 402, 403.

First Nat'l. Bank vs. U. S., 12 Fed. Supp. 301.

Keyes vs. First Nat'l. Bank, (8th Cir.), 25 Fed. (2d) 684.

Myers vs. Hurley Motor Co., 273 U. S. 18, 71 L. Ed. 515, 47 Sup. Ct. Rep. 277.

Has the Government proven the allegation in Paragraph 2 of its complaint that "defendant delivered the supplies pursuant to the contracts and paid to the defendant the full price bid, *which included amounts for which defendant was liable under the supposed authority of the Agricultural Adjustment Act for processing taxes levied by that Act* * * *"?

For the purpose of clearly placing before the Court defendant's position, let us assume for argument's sake that the defendant in submitting the various bids did not include processing tax. If we refer to page 15 of the record and the bid there shown, it will be noted that the unit price bid on bacon was .35[1] a pound. The Government claims that .0429 of the .35 bid represented processing tax. (R. 65). If the Government is permitted to recover in this action, the price the Hagan and Cushing

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[1] All prices are decimals of one dollar.

Company would receive for the bacon would be .3071 per pound. If the bid price of .35 did not include anything for processing taxes, then to permit the Government to recover in this action would reduce the price of bacon to the Hagan and Cushing Company by approximately one-sixth, and the Hagan and Cushing Company would be paying the Government a tax which it had not received in the sale price of the product. If, in fact, the sale price of the product was .3071 per pound, then the Hagan and Cushing Company was overpaid to the extent of the tax. But upon whom did the burden rest of establishing that the sales price of the bacon was .35 per pound or .3071 per pound? We submit the record is devoid of any evidence of whether the sale price was .3071 or .35, or whether the defendant made any allowance whatsoever for processing taxes in submitting its bid price of .35. As shown by the foregoing authorities the burden was upon the Government to establish that in justice and equity the Hagan and Cushing Company had, in fact, been paid the processing tax and by its complaint the Government conceded the rule by affirmatively alleging that the bid prices did include processing taxes. The record may be searched from cover to cover for any evidence tending to establish proof of this fact and nothing will be found that the Government paid the Hagan and Cushing Company any amount whatsoever for processing taxes. We submit the Government cannot take the position on the one hand that the provision in the contract that bid prices included Federal taxes is

binding and that the Hagan and Cushing Company did make allowance in the bid prices for processing tax; while on the other hand the Government takes the position that its agreement in the contract to pay the bid prices is not binding upon it to the extent that it may have paid any amount for processing taxes. If the tax clause in the contract is binding upon Hagan and Cushing Company as proof that it did include the unconstitutional tax in the prices bid, then we submit the Government's agreement to pay the bid prices is equally binding upon the Government. If, on the other hand, the agreement of the Government to pay the bid prices for the pork products is not binding upon it so that it can recover any processing taxes actually paid, then we submit the tax clause is not evidence that the Hagan and Cushing Company did in fact include processing taxes in the bid prices. We think the law is well settled that

> "A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand, while he shirks its disadvantages on the other."
>
> 13 C. J. 623.

CONCLUSION

In its conclusion in its brief appellant says the decision of the court below is wrong, that it is not supported by the facts and the law and should be reversed. In answer appellee says that the decision of the district court is in accord with every decided case in which an attempt was made by a buyer to recover from a seller amounts claimed to have been paid for processing taxes under the Agricultural Adjustment Act where the contracts in question did not contain an agreement on the part of the seller that he would repay the buyer the amount of any processing taxes included in the sales price. Appellant desires to have this court depart from what may now be said to be the overwhelming weight of authority of the Federal Courts on this question and to arrive at a conclusion that because the United States happened to enter into a number of contracts for the purchase of products on which Congress endeavored to levy processing taxes that the Government should be elevated to the unique position of being able to recover the amount of such taxes while the private individual cannot. A Government contract is no different than a private contract in that the rights of the parties must be determined by the terms of the contract. We submit that these contracts should be judged under the guiding principles of previous decisions of other Federal Circuit

Courts and the United States Court of Appeals and that the judgment appealed from should be affirmed.

Respectfully submitted,

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MAY, 1940.

Service of the foregoing this.....day of May, 1940, is hereby acknowledged.

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Counsel for Appellant.